Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79—

In Re
LEONARD M.,

Petitioner,

v.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

PETITION FOR WRIT OF MANDAMUS TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR.

QUIN DENVIR
State Public Defender
LAURANCE S. SMITH
Deputy State Public Defender
RUSSELL I. LYNN
Deputy State Public Defender
455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298
Counsel for Petitioner

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The petitioner moves this court for leave to file the petition for a writ of mandamus hereto annexed. Petitioner moves that an order and rule be entered and issued directing the Honorable Court of Appeal of the State of California, Second Appellate District, Divi-

ision Four. * to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and proper.

Respectfully submitted,

QUIN DENVIR
State Public Defender
of California

LAURANCE S. SMITH
RUSSELL I. LYNN
Deputies State Public
Defender

BY _____
LAURANCE S. SMITH
Deputy State Public
Defender

Attorneys for Petitioner

* The Court of Appeal of the State of California, Second Appellate District, Division Four, consists of four justices, three of whom participated in the instant case, and who are being served individually with this petition: the Honorable Gordon L. Files, Presiding Justice, and the Honorable Robert Kingsley and Bernard S. Jefferson, Associate Justices.

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PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

PETITION FOR WRIT OF MANDAMUS TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

The petitioner, Leonard M., respectfully prays that an order and rule be entered and issued directing the Honorable Court of Appeal of the State of California, Second

Appellate District, Division Four, [1] and the Honorable Robert Kingsley, Gordon L. Files, and Bernard S. Jefferson, justices of said court, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of the petition herein, and why your petitioner should not have such other and further relief as may be just and proper. Petitioner seeks a writ of mandamus to compel said Court of Appeal and said justices to review their judgment and opinion entered in this proceeding on December 18, 1979, which failed to give proper effect to the mandate of this Court entered in this proceeding on July 2, 1979 (*Leonard M.* v. *California* (1979) 443 U.S. ____, 99 S.Ct. 3105 [No. 78-1144], vacating *In re Leonard M.* (1978) 85 Cal.App.3d 887).

OPINIONS BELOW

The second opinion of the Court of Appeal affirming petitioner's conviction in the Juvenile Court for a criminal offense was filed on December 18, 1979, and is attached to the petition as Appendix "A" herein. That opinion was rendered after this Court on July 2, 1979, vacated the first judgment of the Court of Appeal and remanded the case with instructions for further reconsideration (*Leonard M.* v. *California* (1979) 443 U.S. ____, 99 S.Ct. 3105, vacating *In re Leonard M.* (1978) 85 Cal.App.3d 887). That order is reproduced herein as Appendix "B." The order of the Supreme Court of California denying discretionary review of the second opinion

[1] The Court of Appeal for the State of California, Second Appellate District will be referred to hereafter as the "Court of Appeal."

of the Court of Appeal and ordering it withdrawn from publication in the official reports was entered on March 17, 1980, and is reproduced in Appendix "C."

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1651(a), or, in the alternative, Title 28, United States Code section 1257(3). The order of the Court of Appeal became final on March 17, 1980, when the Supreme Court of California denied a petition for discretionary review. (Cal. Rules of Court, rules 25, 28.) [2]

QUESTIONS PRESENTED

1. In light of this Court's remand of the instant case for reconsideration in light of *Jackson* v. *Virginia, Supra,* did the majority of the Court of Appeal misconceive or mistake the mandate of this Court by paying "only lip service to *Jackson* v. *Virginia*" (dis. opn. in Court of Appeal, p. 13 in Appendix "A"); specifically:

A. Did the majority of the Court of Appeal reconsider its opinion not in light of *Jackson* v. *Virginia*, but rather in light of its own prior decision and the result it wanted to reach?

B. Did the majority of the Court of Appeal violate *Jackson* v. *Virginia* by improperly " 'ask[ing] itself whether *it* believes that the evidence at the trial estab-

[2] Three of the seven justices of the Supreme Court of California would have granted petitioner the discretionary review sought; four justices, however, must assent for that Court to grant a hearing. (Cal. Rules of Court, rule 28(e).)

lished guilt beyond a reasonable doubt' " (*id.*, 61 L. Ed. 2d at 573; emphasis in original), and by indulging in a retrial-by-transcript upon a cold appellate record, even though *Jackson* specifically "does not permit a court to make its own subjective determination of guilt or innocence" (*id.*, 61 L.Ed.2d at 574, n. 13)?

C. Since the complainant's testimony was "quite positive" (see 85 Cal.App3d at 889) that petitioner had violated the statute solely through an act of intercourse (which other prosection evidence established to be medically impossible), can that testimony constitutionally be retro-fitted into a theory of the case that some criminal conduct other than what was testified to occurred?

2. Does the Court of Appeal's retroactive modification of the facts and findings below transgress the limitations of due process and violate petitioner's right of confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides:

> "[Section 1.] In all criminal prosections, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Statement of Facts

This case arose from an incident which took place in Los Angeles, California, on June 21, 1976. It was alleged and found true by a juvenile court judge that on that date, petitioner committed a lewd act upon a minor, a five-year-old female neighbor, Perele M., in violation of section 288 of the California Penal Code. The prosecution was solely predicated upon a testified-to alleged act of sexual intercourse.[3]

At trial, the juvenile court heard testimony from Perele M. that petitioner called from over a back fence to her and to Yossi, her four-year-old brother, to "come

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[3] Petitioner had also been charged with participating in oral copulation, in violation of section 288(a) of the California Penal Code, but that allegation was dismissed with prejudice, as there was absolutely no evidence to support it.

over to my house."[4] Perele then related that once inside, Perele asserted that petitioner removed his trousers as well as her panties, that he laid down on top of her, and that he performed an act of full sexual intercourse with her, penetrating her very deeply. Perele fixed the time at 11:30 a.m.

Perele assertedly informed her mother that "the boy next door, the motorcycle boy," had committed a sexual act with her. However, Perele's mother did not either report the incident to police nor seek a medical examination of Perele at that time. Instead, Perele was taken to a park to play. Her mother hoped that having a talk with petitioner's mother would "clear up the matter."

Between 5:00 and 6:00 p.m. the same day, Perele's mother conversed with petitioner's mother. Evidently, it was not until Leonard's mother had expressed skepticism that her son would do such a thing, and behaved in a generally "cool" manner throughout the conversation, that a decision was made to report the matter to authorities.

After a police officer arrived at 7:30 p.m., Perele was taken by her mother to an emergency hospital at about 8:30 p.m. She was examined there by a Dr. Chavez, who reported that there was some redness and swelling present in the vaginal area. However, there was no evidence of bleeding, lacerations, or hematoma. These conditions would normally follow sexual penetration by a

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[4] At the juvenile court hearing, the prosecution presented no evidence from the brother, Yossi, to attempt to support Perele's story.

16-year-old.

The hymen was intact, and no sperm was present in the vaginal tract.

Dr. Chavez indicated that the observed irritation could have been caused by sexual contact. However, as the Court of Appeal acknowledged in its opinion, this condition could as easily have been caused by intervening events. (85 Cal.App.3d at 890.)[5] "In short, the case against [petitioner] rested entirely upon the oral testimony of the young girl." (*Ibid.*)

Petitioner denied raping Perele.

On the afternoon of June 19, petitioner had returned home at about 5:00 p.m. and went to bed ill. Though he had revived somewhat during the evening of June 20, petitioner was sent home from work ill on the morning of June 21. Petitioner was observed by his grandfather, Mr. Litt, at 10:30 a.m. that date, lying in bed and coughing. According to his mother, the cough later developed into pneumonia. Mr. Litt did some watering in the yard outside until 11:15 or 11:25 a.m., and then went "upstairs." At 11:30 a.m., an appliance serviceman arrived and was admitted by petitioner. He worked at the residence for about two hours, and observed no small children present during that time.

Petitioner also produced the testimony of a Dr. Miller, a specialist in adolescent psychiatry. According to Dr.

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[5] Indeed, the young girl testified that when she came home and prior to being examined by the doctor on the day in question, she rubbed her "nooney" (vagina) with her hand and fingers—as she had done in the past—and that sometimes when she rubs it, it gets red.

Miller, petitioner had a stable personality, and was naive and uncurious about sex. Petitioner was active in the Explorer Scouts and tinkered with motorcycles; these activities consumed most of petitioner's "libidinal energies."

Dr. Miller went on to say that he had worked with adolescents who had been involved in molestation of younger children. Such youngsters generally showed a pattern of poorly formed identity, low self-esteem, and depression. They usually evidenced serious maladjustment in school, and were often involved in other criminal activity.

Miller concluded that petitioner's personality and social adjustment were highly inconsistent with pedophilia. Leonard also called as a character witness his scoutmaster, Mr. Lambert, who described petitioner as truthful, "a very excellent boy," and not prone to sexual misconduct.

Procedural History

Petitioner appealed the juvenile court's findings and order on the grounds, inter alia, that despite Perele's testimony to the contrary, the testified-to act of sexual intercourse which supported the violation of California Penal Code section 288, was medically impossible, and therefore, the evidence was legally insufficient. The California Court of Appeal, Second Appellate District, Division Four (Jefferson, J., dissenting) affirmed the findings and orders of the juvenile court. As the dissenting opinion noted, "The majority concludes that since this tes-

timony was accepted by the trial court, it ends all consideration of the issue of whether the evidence was sufficient. *Automatically,* it was sufficient to sustain the finding." (emphasis in original.) The California Supreme Court then denied petitioner's petition for discretionary review to that court, one justice voting to grant a hearing on the petition.

Petitioner then filed a petition for a writ of certiorari to this Court (No. 78-1144). On July 2, 1979, this Court vacated the judgment of the court of appeal and remanded the case for further reconsideration in light of *Jackson* v. *Virginia* (1979) 443 U.S. ____, 99 S.Ct. 2781. On December 18, 1979, the court of appeal issued a second opinion, again affirming the order of the juvenile court. This time the court of appeal chose to deviate from the record facts, as testified to, and speculated that "the trial court could reasonably have inferred" that some lesser untestified-to form of sexual misconduct occurred and that Perele did not mean what she said when she described the completed act of sexual intercourse.

Regardless whether the trial court *could* have indulged such an inference (despite its acquittal on the oral copulation charge), the court of appeal did not even maintain that the trial court *did* harbor such an inference. As the dissenting opinion noted, "The majority pays only lip service to *Jackson* v. *Virginia*" (Appendix "A," p. 8; see also pp. 22–23), by denying petitioner his due process right not to be convicted upon inadequate evidence which could not have led (and, in fact, did not lead) a trier of fact to find guilt beyond a reasonable doubt.

On March 17, 1980, the California Supreme Court again denied petitioner's petition for discretionary review in that court. This time, three justices voted to grant a hearing on the petition (Appendix "C"). (The assent of four justices is required before that court can hear a discretionary appeal.) All appeals being exhausted and there being no remedy through the ordinary further course of appeal, petitioner now files the instant petition for writ of mandamus, or, in the alternative, certiorari, to compel the court of appeal to give proper effect to the mandate of this Court entered on July 2, 1979.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEAL HAS FAILED TO COMPLY WITH THE MANDATE OF THIS COURT IN *LEONARD M.* V. *CALIFORNIA*: INSTEAD OF RECONSIDERING ITS FIRST OPINION, THE COURT HAS ATTEMPTED TO RETROACTIVELY MODIFY THE TESTIMONY AND FINDINGS AT TRIAL, AND HAS PROCEEDED TO UPHOLD A VERDICT WHICH WAS NEVER RENDERED

Leonard M. was convicted of the molestation of a young girl based solely upon her testimony that he had invited her into his home and then inserted his penis into the girl's vagina to a depth of "10 or 11 inches." (Opn. p. 2, n. 1, Appendix "A.")

There is no testimony in this record that during this

purported incident Leonard engaged in any other form of lewd act with the complainant. As a result, an allegation that petitioner violated the statute by an act of oral copulation was found untrue by the trial court.

Competent and uncontradicted medical evidence, produced by the People themselves, established that the complainant's hymen was unruptured, that there was none of the expected lacerations or contusions in the vaginal area, and that a slight redness in the area could have been caused by any of the number of things other than sexual contact with Leonard.[6] There were no traces of semen. The examining physician's conclusion was that the complainant's story was a medical impossibility.[7]

A. The Trial Court's Findings of Fact and the First Appellate Opinion

On Leonard's first appeal, the court of appeal characterized the evidence as "admittedly weak," but never-

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[6] The majority of the court of appeal held such slight redness to be "explainable by intervening events." (*In re Leonard M.* (1978) 85 Cal.App.3d 887, 890.) Indeed, the young girl testified that when she came home and prior to being examined by the doctor on the day in question, she rubbed her "nooney" (vagina) with her hand and fingers—as she had done in the past—and that sometimes when she rubs it, it gets red. (Reporter's Transcript [hereafter "RT"] 102-103; see also RT 72).

[7] Other evidence supports the conclusion that the entire incident was a factual impossibility or a fantasy. The girl's testimony is riddled with difficulties. For example, she testified that the carpeting in Leonard's house was green (RT 10, 38-39), a color she identified in court as similar to the clothing someone was wearing. In fact, uncontradicted testimony and photographic evidence established that the carpeting was a vivid orange (RT 125, 252, 260). Also, Leonard presented alibi testimony (supported by a disinterested appliance repairman), and psychiatric evidence that his personality is not consistent with that of someone who would commit such a crime.

theless affirmed based upon its interpretation of the so-called substantial evidence rule, viz., that the court was required to examine only the evidence supporting the verdict, and to disregard anything inconsistent with such evidence, no matter how conclusive.[8]

"The young girl testified quite positively that the minor had . . . committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding." (*In re Leonard M., supra,* 85 Cal.App.3d 887, 889.) In dissent, Justice Jefferson quite properly protested that,

> "The majority concludes that since this testimony was accepted by the trial court, it ends all consideration of the issue of whether the evidence was sufficient. *Automatically,* it was sufficient to sustain the finding." (85 Cal.App.3d at 892; emphasis in original.)

Thereafter, perhaps concurring with Justice Jefferson's view of the constitutional responsibilities of an appellate court, this Court vacated and remanded pursuant to *Jackson* v. *Virginia, supra. Jackson,* of course, holds that the Constitution requires both consideration of *"all the evidence"* (443 U.S. at ____, 60 L.Ed.2d at

[8] "[T]he court, under the strictures of any substantial evidence rule, may consider only *some* of the evidence, i.e., that favorable to the prosecution. This 'favorable' evidence, isolated and outweighed as it might be . . . will support the guilty verdict so long as it is not a 'physical impossibility,' or *on its face* without consideration of other evidence of inferences, 'false.' (See *People* v. *Lyons* (1956) 47 Cal.2d 311, 320.) All of the remaining evidence, regardless of its convincing and impeaching force, must be rejected from consideration." (*People* v. *Blum* (1973) 35 Cal.App.3d 515, 523 [Elkington, J., conc.].)

573), and a determination of whether a reasonable trier of fact could have been persuaded of the guilt of the accused to a degree of "near certitude" (433 U.S. at ____, 60 L.Ed.2d at 571), i.e., beyond a reasonable doubt.

B. The Second Appellate Opinion and the *Nunc Pro Tunc* Revision of the Trial Court's Findings

In its second opinion, the Court of Appeal correctly recited that now, under *Jackson,* it was required ". . . to consider not only the case for the prosecution but the entire record, including the defense testimony, and to affirm only if we can find that a reasonable finder of fact could, on the whole evidence, rationally have found guilt beyond a reasonable doubt." (Slip. opn. at p. 6; Appendix "A.") Thus, the court impliedly conceded that there was insufficient evidence to sustain a finding that Leonard engaged in sexual intercourse with the complainant.

A reasonable *reader* would have expected at this point that the case would be over, and that since the finding of sexual intercourse was clearly not a reasonable one, taking the whole record into account, the finding of guilt would be reversed.

It wasn't.

Instead, the court of appeal proceeded to take one of the most astonishing leaps from a correct premise to an absurd result which has ever been evidenced in an appellate opinion: It changed the trial court's findings of fact *nunc pro tunc* and affirmed them, forgetting to note that there wasn't any evidence to support the nonexistent finding. While purporting to follow *Jackson,* the

court merely "reconsidered" the case in light of its own prior decision and the result it wanted to achieve.[9]

The court of appeal, this second time around, now rejected the girl's testimony that the penis was inserted "far" and "inside" her vagina and that it "hurt," despite the court's finding that the girl was "more intelligent, competent, and articulate . . ." (App "A" at 7, n. 3) than the average child of that age. Thus, the majority indulged in the following irrational speculation: "On this record the trial court could reasonably have inferred that the child was describing how it felt when a penis was pushed into the area between her legs and against or across the outer portion of her vagina." (Slip opn. at pp. 6–7.) However, it should be noted that since the girl admitted to prior acts of self-stimulation, the only reasonable conclusion is that she knew the difference between "in" and "out," particularly as it related to her vagina, and that she knew exactly what she was testifying about. The majority, nonetheless, managed to find that something less than a rape and other than what was unambiguously testified to occurred.

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[9] In second-guessing not only the girl's testimony but the trial court's findings as well, the majority of the court of appeal indulged in exactly what was prohibited by *Jackson* v. *Virginia, supra:* (the majority improperly " 'ask[ed] itself whether *it* believes that the . . . trial established guilt beyond a reasonable doubt.' " (*Id.*, 61 L.Ed.2d at 573; emphasis in original.) The majority thus indulged in the futile retrial-by-transcript, upon a cold appellate record, lacking the trial court's benefit of observations as to demeanor, as well as tones of voice and hesitations of speech. *Jackson* specifically "does not permit a court to make its own subjective determination of guilt or innocence . . ." (*Id.*, 61 L.Ed.2d at 547, n. 13.)

If such a "finding" was reasonable, it would have been equally reasonable when the first opinion was written, wherein the trial court's "finding" was characterized as acceptance of the occurrence of a complete act of sexual intercourse.

> "On a first appeal, we affirmed the finding on the ground that the little girl's testimony, believed by the trial court, was sufficient to sustain it." (App. "A" at 3)

There was no testimony whatsoever that some other lesser form of lewd act occurred. While an inference may be deemed reasonable if based on evidence, it is not evidence itself. (Cal. Evid. Code, §§ 140, 600(b).) [10] A speculation, assumption, or inference of what might have happened but was not testified to is thus not in itself evidence upon which a court may base the affirmance of a conviction.

Just as a verdict cannot be changed *nunc pro tunc,* neither can the testimony of a witness: There is simply no escape from the fact that if the complainant's testimony was "quite positive" (see 85 Cal.App.3d at 899)

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[10] California Evidence Code section 140 defines "evidence" as:

". . . testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence of nonexistence of a fact."

California Evidence Code section 600(b) defines an "inference" as:

". . . a deduction of fact that may logically and reasonably be drawn from another fact or a group of facts found or otherwise established in the action."

The Assembly Committee Comment to section 600(b) makes abundantly clear that, "under the Evidence Code, an inference is not itself evidence . . ." (Parker's Evidence Code of California (1979), p. 60.)

that petitioner had violated the statute solely through an act of intercourse, that testimony cannot be retro-fitted into a theory of the case conceived for the first time by a court of appeal taking a second crack at the record on remand.

C. The Court of Appeal's Retroactive Modification of the Facts and Findings Below Transgresses the Limitations of Due Process and Denies Petitioner His Right to Confrontation and Cross-Examination

In *Cole* v. *Arkansas* (1947) 333 U.S. 196, an individual was convicted of violation of an Arkansas statute relating to labor disputes. Like section 288 of the California Penal Code, the statute in *Cole,* as interpreted by the Arkansas court, could be violated by more than one specific form of conduct. The statute in *Cole* could be violated by either: (1) preventing a person from engaging in employment by force and violence in concert with others, or (2) promoting an assemblage of persons having the aim of preventing someone from working. Cole was tried and convicted upon the theory that he had promoted an unlawful assemblage rather than actually using force upon someone wishing to work; the jury convicted him of this specific conduct. The Arkansas Supreme Court refused to consider the sufficiency of the evidence relating to promoting an unlawful assembly, but instead improperly affirmed based upon its own finding that Cole had employed actual force and violence upon an employee.

Similarly, in the instant case, the court of appeal relied upon a theory of criminal conduct other than that es-

poused by the prosecutor and relied upon by the court.

This Court's response here should be what it was in *Cole*:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law." (*Cole* v. *Arkansas, supra,* 333 U.S. at 202.)

The premise of the *Jackson* opinion was the same due process rationale which brought the holding in *Cole.* (*Jackson* v. *Virginia, supra,* 61 L.Ed.2d at 750.) As the *Jackson* Court emphasized, the basic standards in *Cole* ". . . no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and meaningful opportunity to defend." (*Jackson* v. *Virginia, supra,* 61 L.Ed.2d at 570.) Here, petitioner never had any meaningful opportunity to defend, since his conviction, we find out for the first time on appeal, is based upon something other than what was exclusively and unambiguously testified to at trial. A defendant is surely denied due process and any meaningful Sixth Amendment right of confrontation and cross-examination where the critical "evidence" against him appears for the first time on appeal.[11]

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[11] It is interesting to note that in other criminal contexts, California courts have had no problem restricting a party to the same theory on appeal as at trial. For example, such is clearly the rule of appellate review when appealing from the denial of a motion to suppress illegally seized evidence. (E.g., *People* v. *Shuey* (1975)

In the instant case, it is significant that neither the assistant district attorney trying the case nor the juvenile court judge either argued or attempted to make the inferences and interpretations which the majority in the instant case did. Moreover, if there was any ambiguity which could reasonably have been clarified, the prosecution would no doubt have done so on redirect examination. Likewise, it is well-settled that the trial court is free to inject itself to ask clarifying questions and to illuminate any factual ambiguities. (Cal. Evid. Code, § 765.) However, the factual theory used to support the conviction appears for the first time only during his second appeal.

In sum, to hold appellant to the court of appeal's unsupported inferences and interpretations is to deny appellant his federal constitutional rights to due process, confrontation, and cross-examination.

D. A Writ of Mandamus Is the Proper Remedy

This Court has long held that a writ of mandamus is the proper remedy for a party, who, like petitioner herein, has prevailed in this Court where the lower court then "does not proceed to execute the mandate, or disobeys and mistakes its meaning." (*United States* v. *Fos-*

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13 Cal.3d 835, 847–848; *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 640; *People* v. *Superior Court (Simon)* (1972) 7 Cal.3d 186, 198.) The rationale for preventing the prosecution from advancing new theories never before espoused at the suppression hearing is the same rationale which should prohibit appellate courts from making new unwarranted inferences and interpretations of the facts to affirm a conviction. In either case, ". . . inject[ing a] new theory . . . would deprive the [petitioner] of a fair opportunity to present an adequate record in response." (*People* v. *Superior Court (Simon), supra,* 7 Cal.3d at 198.) Petitioner had no opportunity "to present evidence on cross-examination to rebut the factual basis underlying [the majority's affirmance]. (*Id.* at 198–199.)

satt (1859) 21 How. 445, 446.) More recently, this Court has reiterated that a writ of mandate is available not only where there is a flagrant disregard for the mandate of this Court, but where there is "evidently . . . a misconception of the scope and effect of this Court's" prior opinion. (*United States* v. *Haley* (1962) 371 U.S. 18.)

It is also well-settled that a writ of mandamus may be sought, as here, to correct a failure by a state court to comply with a Supreme Court mandate. Such was the case in *Deen* v. *Hickman* (1958) 358 U.S. 57, where petitioner properly sought a writ of mandamus to compel the highest court of a state to conform its decision to a previous ruling of this Court in the same case, involving this Court's factual analysis of the sufficiency of the evidence in a railroad negligence case.

Petitioner has twice been unsuccessful in this case before the California Court of Appeal and has futilely petitioned that court for a rehearing, presenting the very same contentions presented here. Petitioner's pleas for relief have also fallen on the deaf ears of the California Supreme Court. There is no further place to turn to rectify the apparent disobedience, mistake, or misunderstanding of this Court's mandate, and a writ of mandamus is thus necessary and proper.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Court of Appeal of the State of California, Second Appellate District, Division Four, and the Honorable Robert Kingsley, Gordon L. Files, and Bernard S. Jefferson, Justices of the Court of Appeal of the State of

California, Second Appellate District, requiring said court and Honorable Justices to show cause on a date to be fixed by this Court why mandamus should not issue from this Court directing said court and justices to vacate the judgment and opinion of December 18, 1979, rendered against petitioner and to order the case against him dismissed with prejudice, based upon the inability of the record evidence to support a finding by any rational trier of fact of petitioner's alleged guilt of this serious allegation beyond a reasonable doubt.

2. That in the event this Court should deem mandamus not to be a proper remedy, the instant petition be treated as a petition for writ of certiorari.[12]

3. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

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[12] If the request for extraordinary relief by way of writ of mandamus is deemed unjustified or unnecessary, this Court may in its discretion treat this petition as a petition for certiorari. (*Collier* v. *United States* (1965) 382 U.S. 890.)

DATED: May 6, 1980.

Respectfully submitted,
QUIN DENVIR
State Public Defender

LAURANCE S. SMITH
RUSSELL I. LYNN
Deputies State
Public Defender

By_____
Laurance S. Smith
Counsel for Petitioner

Of Counsel:
Elliot B. Feldman, Esq.
9465 Wilshire Blvd., Ste. 617
Beverly Hills, CA 90212

APPENDIX A

Crim #30946
FILED
December 18, 1979
Clay Robbins, Jr.
Clerk

[100 Cal App 3d 11]

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION FOUR

In Re LEONARD M.
A Person Coming Under the Juvenile Court Law
KENNETH F. FARE,
As Chief Probation Officer, etc.,
Plaintiff & Respondent
vs.
LEONARD M.,
Defendant and Appellant

OPINION

KINGSLEY, J.—A minor appeals from an order finding him to be a person within the meaning of section 602 of the Welfare and Institutions Code and directing a suitable placement for him. We affirm the order.

The minor, 16 years of age, was charged: (paragraph I) with committing a lewd act on a six-year-old girl; and (paragraph II) with orally copulating the same girl. After a hearing, he was found guilty under paragraph I;

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paragraph II was dismissed.

On this appeal, the minor contends: (1) that the evidence does not support the finding; and (2) that he was denied the effective assistance of counsel. We reject both contentions.

I

The little girl testified that the minor, a neighbor boy, invited her into his house, asked her to lie down on the floor, pulled down her panties and his underpants and pants, lay down on top of her, and put his "nooney" into hers.[1]

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[1] The girl's mother testified that, in the family, the word "nooney" referred to the vagina of a girl or the penis of a boy.

The girl's cross-examination, opening with a leading question by defense counsel, was as follows:

"Q. You said Leonard put his nooney inside your nooney; is that right?
"A. Yeah.
"Q. And you said that hurt you?
"A. Yeah.
"Q. Did you feel it going inside your nooney?
"A. Yeah.
"Q. How far in your nooney did you feel it go?
"A. A lot far.
"Q. How far? Could you show me with your hands or your fingers?
"(Witness indicating.)
"MR. SMITH: Indicating about 10, 11 inches.
"THE COURT: Yes.
"BY MR. SMITH: Did you feel anything when Leonard put his nooney about that far into you?
"A. Yeah.
"Q. What did you feel?
"A. It hurted me.
"Q. Okay. Do you know what blood is?
"A. Yeah.
"Q. Did you see any blood?
"A. No.
"Q. Did you feel wet all over?
"A. No."

The girl testified that, immediately after the events above described, she went home and immediately complained to her mother. She was not examined by a physician until several hours later. That examination disclosed no bleeding; no indication of semen, and an unruptured hymen; it disclosed a slight redness of the vagina.[2] The medical evidence was that it was medically impossible for there to have been penetration without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character.

On this present appeal, defense counsel argues the case as though the charge had been rape. However, the charge and the finding were only of the commission of a lewd act, not rape. On a first appeal, we affirmed the finding on the ground that the little girl's testimony, believed by the trial court, was sufficient to sustain it. (*In re Leonard M.* (1978) 85 Cal.App.3d 887 [149 Cal.Rptr. 791].) The case has now been returned to us by the United States Supreme Court with directions to reconsider the issue under the standard laid down in *Jackson* v. *Virginia* (1979) 443 U.S.—[61 L.Ed.2d 560, 99 S.Ct.—]. We proceed to make such a review of the evidence.

The standard thus imposed on us requires us to consider not only the case for the petitioner but the entire record, including the defense testimony, and to affirm only if we can find that a reasonable finder of fact could,

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[2] The evidence indicates the possibility that the redness was due to causes other than contact with the minor.

on the whole evidence, rationally have found guilt beyond a reasonable doubt. We here make such a finding.

It is true that the child testified that the minor had put his nooney "in" hers, and on cross-examination she answered affirmatively to questions about how it felt "inside" her nooney, while the medical testimony showed that no penetration of more than a quarter of an inch could have occurred without rupture of the hymen. On this record the trial court could reasonably have inferred that the child was describing how it felt when a penis was pushed into the area between her legs and against or across the outer portion of her vagina. It was reasonable for the trial court to believe that the child had no conception that the cross-examiner's questions might have referred to a penetration beyond the hymen. So interpreted, the child's testimony is not in conflict with the medical testimony, and is sufficient to support the finding of the trial court.

II

The minor's other contention is that he was denied effective assistance of counsel in that his retained trial attorney had not sought a psychiatric examination of the little girl. As we did on the first appeal, we reject that contention.

Counsel rest their argument on *People* v. *Lang* (1974) 11 Cal.3d 134 [113 Cal.Rptr. 9, 520 P.2d 393]. In that case, which did involve several factual similarities, our Supreme Court said, in footnote 3 on page 140: "Such an examination would seem a minimum protection for a

defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one. As the trial judge indicated in this case, shortly before finding defendant guilty, 'I don't know how bright these girls [the twins] are. I don't know what their capacity for fantasy is.' The results of a psychiatric examination of the twins might easily have tipped the balance in this close case in favor of defendant, whose strongest defense was that the twins lied about him." That statement was quoted with approval by the Chief Justice in her dissent in *People* v. *Thomas* (1978) 20 Cal.3d 457, at page 472 [143 Cal.Rptr. 215, 573 P.2d 433].

Based on that language, and on a claim of weakness of the case against defendant, the minor here contends that the failure of his trial counsel to seek a psychiatric examination of the girl evidenced incompetency that deprived him of a fair trial.

We reject that contention. *Lang* did not hold that every failure to seek a psychiatric examination of an alleged victim in child abuse cases is, as a matter of law, an incompetent representation. Its holding went no further than to require *appellate* counsel to raise that matter on appeal—a duty ably performed by the appellate counsel in this case.

However, as the Supreme Court pointed out in *People* v. *Jenkins* (1975) 13 Cal.3d 749, at pages 754–755 [119 Cal.Rptr. 705, 532 P.2d 857], quoting from *People* v. *Garrison* (1966) 246 Cal.App.2d 343, 350–351 [54 Cal.Rptr. 731]: ". . . However, in the absence of affirmatively showing that counsel acquiesced through ignorance of

the facts or the law, defendants are not entitled to relief. 'The failure of counsel to object at the trial does not ordinarily indicate either incompetence of counsel or unfairness to the client. The system of objections is a useful tool in the hands of a trained professional for the exclusion of matter which should not be received into evidence. But the indiscriminate use of objections, solely because they are available, aids neither the client nor the cause of justice. The choice of when to object to and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations.] The decisions which counsel must make in the courtroom will necessarily depend in part upon what he then knows about the case, including what his own client has told him. There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision. Thus, the appellate court's inability to understand why counsel did as he did cannot be a basis for inferring that he was wrong.' "

Since a psychiatric examination of a witness is open to use by both sides (*People v. Blakesley* (1972) 26 Cal. App.3d 723, 729 [102 Cal.Rptr. 885]), it is a two-edged sword. Nothing in the record before us indicates that trial counsel was ignorant of his right to seek a psychiatric examination; nothing in that record tells us what investigation he may have made of the ability of the girl to testify honestly and accurately. Since nothing in the record shows that the failure here complained of was not

a reasoned tactical decision,[3] we cannot, on that record, hold that the trial counsel did not receive "the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate." (*People v. Pope* (1979) 23 Cal.3d 412, 427 [152 Cal.Rptr. 732, 590 P.2d 859].)

The order is affirmed.

I concur, FILES.
P.J.

JEFFERSON (Bernard), J.—I dissent.

Today's decision of the majority constitutes a grave and gross miscarriage of justice. For the second time in the history of this case, the majority affirms a finding by the trial court that Leonard, a 16-year-old minor, committed a lewd act upon Perele, a 5-year-old girl, based upon evidence that can only be described as substantially insubstantial, since it is totally conjectural, speculative and merely raises a weak suspicion of Leonard's culpability. In reaching this result, the majority places its stamp of approval upon the trial court's action of clothing the minor with the catastrophic lifetime stigma of having committed a serious sexual offense. Although I despise and detest the sexual crime of child molestation,

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[3] It is significant that the trial court, after a voir dire examination of the girl by defense counsel, denied that counsel's request to hold her incompetent to testify. The court said: ". . . I find that she is quite competent to testify. This court has had the opportunity in the last several years to observe numerous witnesses about the age of this child, and I would say that she appears to be more intelligent, competent, and articulate than the average five year old by a long shot, so your motion is denied. . . ."

and have no sympathy for a perpetrator thereof, I am unwilling to uphold the minor's conviction of such offense based upon the flimsy kind of evidence presented in the case at bench.

The history of this litigation is of more than slight significance. When this case originally came before us in 1978, the majority reached the same conclusion that it reaches today. (See *In re Leonard M.* (1978) 85 Cal. App.3d 887 [149 Cal.Rptr. 791].) In the 1978 opinion, the majority rejected the minor's contentions that (1) the evidence was insufficient to support the finding that he had committed a violation of section 288 of the Penal Code, and (2) that he had been denied his constitutional right to effective assistance of counsel at his trial. The California Supreme Court denied a hearing, but the Supreme Court of the United States granted the minor's petition for a writ of certiorari. The nation's highest court vacated the 1978 judgment of this court and remanded the case to us for further consideration in light of *Jackson* v. *Virginia* (1979) 443 U.S.—[61 L.Ed.2d 560, 99 S.Ct.—]. In reaching its 1978 decision, the majority erroneously found no validity to the minor's two contentions. In reaching the same result today, after a remand of the case from the United States Supreme Court, the majority pays only lip service to *Jackson* v. *Virginia* and again erroneously finds no validity to the minor's two contentions.

I found merit in both contentions of the minor when this case was before us in 1978 and I wrote a dissenting opinion. Today I find the minor's contentions to be even

more meritorious because of *Jackson* v. *Virginia*. I thus find it necessary to again dissent from the views expressed by the majority today.

I

Insufficiency of the Evidence

In this case before us, the victim, Perele, a 5-year-old neighbor girl, testified that the minor, Leonard, a 16-year-old boy, had actual sexual intercourse with her—not simply the commission of a lewd act. I concede that the victim did not use the words "sexual intercourse." But she did use language which reasonably can only be interpreted as "sexual intercourse."

The mother of Perele testified that she had taught her children, both male and female, to use the term "nooney" as meaning both the female vagina and the male penis. Perele testified that Leonard's "nooney" was like her brother's, rather than like hers and, when asked "[w]hat did he do with his nooney?" she answered, "*[h]e put it in mine.*" (Italics added.) She was asked "[c]ould you feel anything in your nooney when he started to put something into it?" She answered "[y]eah." In response to the question "[w]hat did you feel," she replied "I felt—I felt that it hurted." She then testified that he kept doing it even though she had said it was hurting.

On cross-examination, Perele was asked: "You said Leonard put his nooney inside your nooney; is that right?" She replied "[y]eah." She was then asked: "Did you feel it going inside your nooney?" She replied "[y]eah."

Next she was asked: "How far in your nooney did you feel it go?" Her answer was "[a] lot far." She was asked to show "how far" by use of her hands or fingers. Perele so indicated and the trial court agreed with counsel that the witness had indicated 10 or 11 inches.

The event described by Perele happened around 11:-30 a.m. Perele, however, was not taken to the hospital until about 8:30 p.m. that evening. She was examined by Dr. Chavez. Dr. Chavez testified that his examination revealed there was some redness and swelling of the labia of the vagina but "[t]here was no evidence of bleeding, no evidence of laceration or hematoma, and the hymen was intact." Dr. Chavez also testified that it was medically impossible for the minor to have had sexual intercourse with the victim as described by her in her testimony. Dr. Chavez indicated that the irritation to the vagina was localized as he had described it. His testimony was that "[t]here was no evidence of a trauma in the inguinal area, the buttocks or the thighs. It was specifically localized."

With respect to the cause of the irritation to Perle's vagina, Dr. Chavez concluded that one of the possibilities was "sexual contact." He then defined "sexual contact" as denoting "that the genitalia of the patient [Perele] was in one form or another manipulated by some instrument; penis, hand, an artificial object." In describing the objects, he indicated he had in mind "blunt trauma from any object" and also "self-stimulation." Dr. Chavez also testified that the only possibility of a penis being inserted in Perele's vagina without rup-

turing the hymen would be that of a penetration of no more than one-fourth of an inch.

It is to be noted that at no time did Dr. Chavez testify to any medical *"probability"* as distinguished from a "possibility" that the irritation to Perele's vagina resulted from either a male penis, some blunt object, or self-stimulation. Nor did he testify that any one of the three possibilities was more probable than another.

In addition, Perele testified that she had rubbed her "nooney" with her fingers on that day that she came home from Leonard's home and that, at other times when she rubbed her "nooney," it would get red.

Although this alleged incident was reported by Perele to her mother in the area of 11:30 a.m., the mother took Perele and her other children to a park that same day around 2 p.m. and did not return home until between 5 and 6 p.m. It is to be noted that Perele played at the park where there was located a slide, swings, and a monkey bar—all blunt objects that could cause trauma to a vagina.

The defendant called a number of witnesses in his defense, including a psychiatrist who conducted an examination of Leonard. The defense was in the nature of an alibi with disinterested testimony that Perele was not in the company of Leonard on the day in question.

The majority opinion expresses the view that defense counsel has argued this case as though the charge had been rape, when in fact the charge and finding were only that of the commission of a lewd act, not rape. But I do not construe defense counsel's argument in this

manner. Although the charge was that of the commission of a lewd act, the alleged victim's testimony was unmistakably directed to the fact that she had been *raped*—not molested in any other fashion. The believability of her testimony that Leonard committed the act of *sexual intercourse* with her is the crucial issue involved in this case.

I agree with the majority that the question before us now, as it was in 1978, is whether the evidence was sufficient to sustain a finding that Leonard committed a lewd act upon Perele in violation of Penal Code section 288. On the first appeal (*In re Leonard M.* (1978) 85 Cal. App.3d 887 [149 Cal.Rptr. 791]), the majority found that the evidence was sufficient. On the remand of the case to us from the United States Supreme Court with directions "for further consideration in light of *Jackson* v. *Virginia,* 443 U.S.—(1979)," the majority reaches the very same conclusion it reached in the first appeal. Does this mean that the standard of appellate review for testing sufficiency of the evidence to sustain a criminal conviction set forth in *Jackson* v. *Virginia* is the same as that heretofore applied by the majority on the first appeal?

What is the standard for review mandated by *Jackson* v. *Virginia* when a contention is made on appeal that the evidence is insufficient to sustain a conviction? At one point in *Jackson* v. *Virginia,* the court observed: "After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evi-

dence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' *Woodby* v. *INS,* 385 U.S. 276, 282 [17 L.Ed.2d 362, 87 S.Ct. 483]. Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana,* 406 U.S. 356, 362 [32 L.Ed.2d 152, 92 S.Ct. 1620]. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (*Jackson* v. *Virginia, supra,* 443 U.S.—, —[61 L.Ed.2d 560, 573].) (Italics in original; fn. omitted.)

At another point in the opinion, the *Jackson* v. *Virginia* court makes the observation that a defendant is entitled to have his conviction set aside "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (*Id.* at p.—[61 L.Ed.2d 560, 576–577]; fn. omitted.)

I interpret *Jackson* v. *Virginia* as mandating that, upon

a contention being made that the evidence is insufficient to sustain a conviction, the appellate court must review *all of the evidence in the case,* including the *defense evidence* as well as the prosecution evidence, to determine whether a rational trier of fact could find that each element of the offense charged has been established beyond a reasonable doubt. To put it another way, *Jackson* v. *Virginia* tells us that if, upon *all* the evidence introduced at the trial, no rational trier could have found the existence of each element of the offense beyond a reasonable doubt, there is insufficiency of the evidence to sustain a conviction.

Since the decision of *Jackson* v. *Virginia,* there has been considerable decisional law discussion in California cases seeking to determine whether *Jackson* mandates a different standard of review from that previously followed by the California courts. In *In re Frederick G.* (1979) 96 Cal.App.3d 353, 365 [157 Cal.Rptr. 769], the conclusion is reached that "the California substantial evidence test has not been changed by *Jackson* and that it comports with due process of law." In *In re Charles G.* (1979) 95 Cal.App.3d 62 [156 Cal.Rptr. 832], the court, although applying what it deemed the California substantial evidence test, concluded that there was substantial evidence to support a juvenile court's finding, but stating that the same conclusion would be reached following the *Jackson* v. *Virginia* standard, in that the court "would not conclude in the instant case that no rational trier of fact could have found true the allegation of the supplemental petition beyond a reasonable doubt." (*Id.* at p. 67; fn. 3.)

Long before *Jackson* v. *Virginia,* it had become established law in California that "[i]t is the function of [an appellate] court in reviewing a criminal conviction on appeal to determine whether the record contains *any substantial evidence* tending to support the finding of the trier of fact, and in considering this question we [the appellate court] must view this evidence in the light most favorable to the finding. [Citation.] The test is not whether guilt is established beyond a reasonable doubt. [Citations.]" (*In re Roderick P.* (1972) 7 Cal.3d 801, 808 [103 Cal.Rptr. 425, 500 P.2d 1].) (Italics added.) The *In re Roderick P.* court stated that this same principle of appellate review was applicable to juvenile court proceedings. (*In re Roderick P., supra,* 7 Cal.3d 801, 809.)

The serious question to be answered under California's "substantial evidence" test is what is meant by "any substantial evidence." The California Supreme Court has defined "any substantial evidence" to mean "evidence that reasonably inspires confidence" and "is 'of solid value.' " (*People* v. *Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777]; *In re Roderick P., supra,* 7 Cal.3d 801, 809.) We need to consider, however, how this definition of substantial evidence fits into the mandate of *Jackson* v. *Virgina.* I do not agree with *In re Frederick G.* and *In re Charles G.* in their analyses that *Jackson* v. *Virginia* has *not* mandated a different standard for the appellate courts of California when the issue is raised that the evidence is insufficient to sustain a defendant's conviction.

The pronouncements of the California Supreme Court that the substantial evidence test is satisfied if there is evidence in the record that "reasonably inspires confidence" and is of "solid value" to support a defendant's conviction have been given lip service only, because of decisional law interpretations of what these phrases mean. Thus, the decisional law has sanctioned the view that a child complaining witness' testimony which is suspect and permeated with indicia of untrustworthiness and unreliability constitutes substantial evidence that "reasonably inspires confidence" and is of "solid value" simply and solely because a trial judge chose to believe such testimony. The majority in the case before us on the first appeal applied this test when it stated: "The young girl testified quite positively that the minor had invited her into his home, where he was alone, and there committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding."

I cannot agree, therefore, that *Jackson* v. *Virginia* has *not* changed prior California law in view of the fact that, under such prior California law, untrustworthy and unreliable testimony has been considered sufficient to sustain a conviction. I would consider the failure of the California Supreme Court to grant a hearing after the majority's decision in the instant case in 1978 as some substantiation of my view that the prior California substantial-evidence test did not require a reversal of a defendant's conviction that was based on inadequate and insufficient evidence as long as the trier of fact chose to believe such evidence.

What is significant about *Jackson* v. *Virginia,* contrasted with California's substantial evidence test, is that it focuses the appellate inquiry on a defendant's constitutional due process right *not* to be convicted on *inadequate* evidence that "cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt." (*Jackson* v. *Virginia, supra,* 443 U.S. at p.____[61 L.Ed.2d at p. 574].) The California "any substantial evidence" rule has not focused on the inquiry in terms of whether the trier of fact has violated this constitutional due process right.

That the prior California rule of appellate review cannot be considered as the substantial equivalent of the due process standard set forth in *Jackson* v. *Virginia* is demonstrated by the fact that some of the decisional law in California has distinguished between a standard of review for first degree murder verdicts and all other criminal cases. In *People* v. *Fonville* (1973) 35 Cal.App.3d 693, 703–704 [111 Cal.Rptr. 53], the court remarked: " 'In conventional appellate review the function "begins and ends" with the discovery of substantial evidence supporting the verdict. [Citation.] The task is relatively passive, relatively one-sided, fulfilled when the prosecution evidence turns out to be "reasonable in nature, credible, and of solid value; . . ." [Citation.] In the review of first degree murder verdicts (especially when featured by possibilities of diminished capacity) the substantial evidence formulation persists, but the appellate role is more intense, more active. Appellate

duty is not satisfied, in the latter case, *when substantial evidence emerges on one side.* Rather, the judges must look to the evidence *on both sides* and not limit their scrutiny to that supporting the verdict.' " (Italics added.)

And in *People* v. *Bassett* (1968) 69 Cal.2d 122 [70 Cal.Rptr. 193, 443 P.2d 777], our high court seemed to draw a distinction between the scope of appellate review in cases in which the crime charged is divided into degrees and cases in which the offense charged is not divided into degrees. Thus we find the *Bassett* court stating that, " '[s]ince the amendment of Penal Code section 1181 in 1927,[1] this court is empowered to modify the judgment and fix a lesser degree of the crime in those instances where *on an appraisal of all the evidence* there is found to be lacking any *substantial* evidence of the elements required to constitute the degree of the crime as fixed by the jury. [Citations.]' [¶] As the emphasized language indicates, our task in this regard is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to

[1] In pertinent part, Penal Code section 1181, subdivision 6, provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] 6 When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

isolated bits of evidence selected by the respondent." (*Id.* at pp. 137–138.) (Italics in original; fn. omitted.)

If we are to accept *Bassett* as stating the rule of appellate review prior to *Jackson* v. *Virginia,* we must conclude that to test the sufficiency of the evidence to sustain a finding that all elements of an offense have been established beyond a reasonable doubt, the test to be applied of "an appraisal of all of the evidence" applies only to crimes divided into degrees. In the case before us the offense of lewd conduct with a minor is not an offense divided into degrees. Under the *Bassett* formula, and also under the *Fonville* formula, the appellate court would be exercising "conventional appellate review" without the necessity of a search of the entire record. I submit that the *Bassett* and *Fonville* rules for conventional appellate review for crimes not divided into degrees and for crimes other than first degree murder are in violation of the due process of law standard of appellate review established by *Jackson* v. *Virginia.*

Has *Bassett* and *Fonville* been modified by subsequent cases? There is language in subsequent cases which, at first glance, might seem to indicate a modification. Thus in *People* v. *Reyes* (1974) 12 Cal.3d 486 [116 Cal.Rptr. 217, 526 P.2d 225], we find the following language which would appear to epitomize the California rule prior to *Jackson* v. *Virignia:* "There is merit to Venegas' [a defendant] contention that the evidence adduced at trial is insufficient to support the judgment rendered against him. In reviewing a criminal conviction, an 'appellate court must determine whether a reasonable trier

of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' (*People* v. *Reilly* (1970) 3 Cal.3d 421, 425 [90 Cal.Rptr. 417, 475 P.2d 649]; see also *People* v. *Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392, 57 A.L.R.3d 1199]; *People* v. *Redmond* (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321]; *People* v. *Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777]; *People* v. *Hall* (1964) 62 Cal.2d 104, 109–110 [41 Cal.Rptr. 284, 396 P.2d 700].) The substantial evidence rule is our yardstick for determining whether a verdict meets this minimal standard of reasonableness: 'The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' (*People* v. *Mosher* (1969) 1 Cal.3d 379, 395 [82 Cal.Rptr. 379, 461 P.2d 659]; see also *People* v. *Kunkin* (1973) *supra; People* v. *Reilly* (1970) *supra; People* v. *Redmond* (1969) *supra.*) To be considered substantial, evidence must be of the type which 'reasonably inspires confidence and is "of sold value." ' " (*Reyes, supra,* 12 Cal.3d 486, 496–497.)

Significancy must be attached to the fact that *Reyes* cites *Bassett* as one of the authorities for the substantial evidence test. And since *Reyes* was a murder case, we can assume that the substantial evidence test discussed was that applicable to murder cases and cases involving crimes divided into degrees so that the record evidence reviewed would be the *entire* evidence—not simply the evidence introduced by the prosecution. Only the prosecution's evidence constitutes the record evidence

reviewed under the conventional appellate review test sanctioned expressly by *Fonville* and impliedly by *Bassett.*

The conventional appellate review test sanctioned by *Fonville* and *Bassett* simply cannot be squared with the requirements of *Jackson* v. *Virginia.* There can no longer be a test for determining sufficiency of the evidence that does not require, in the case of all crimes, an appellate review of *all* the evidence—both that presented by the prosecution and that presented by the defendant—in order to determine a defendant's claim that he has been convicted upon inadequate or insufficient evidence—evidence upon which no rational trier of fact could have found proof of guilt beyond a reasonable doubt. As *Jackson* v. *Virginia* points out, "[t]he question whether a defendant has been convicted upon *inadequate* evidence is central to the basic question of guilt or innocence." (*Jackson* v. *Virginia, supra,* 443 U.S. ____, ____ [61 L.Ed.2d 560, 576].) (Italics added.)

The majority in today's opinion recognizes that *Jackson* v. *Virginia* requires an appellate court to review and examine *all* of the record evidence in order to determine whether a rational trier of fact could find every element of the charged offense established beyond a reasonable doubt. But the crucial point at issue is what must be looked for in that examination and review. The majority in the case before us seems to say that, after an examination of all of the evidence has been made, the appellate court is still entitled to conclude that the prosecution's evidence—even though it be conjectural,

speculative, untrustworthy and unreliable and, hence, inadequate—can still constitute substantial evidence to permit the appellate court to conclude that a reasonable trier of fact could find all of the elements of the offense against a defendant established beyond a reasonable doubt.

In my view, *Jackson* v. *Virginia* requires that, in examining *all* of the evidence in a criminal case, the appellate court must weigh and contrast any weak, unsatisfactory, untrustworthy and unreliable evidence introduced in support of the prosecution's case with any strong, reliable and trustworthy evidence presented by the defense. In such a case an analysis of all such evidence leads inexorably to a holding that, under *Jackson* v. *Virginia,* a defendant has set forth a valid constitutional due process claim that the evidence in support of his conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt. That is exactly the situation presented in the case before us.

The instant case demonstrates how easy it is for an appellate court to simply pay lip service to the principle mandated by *Jackson* v. *Virginia.* The majority opinion, written in 1978, stated that the trial judge was entitled to believe Perele's testimony that Leonard had "committed an act of intercourse with her," even though the majority described the case against Leonard as being weak and used the following language in so describing this weakness: "However, the evidence was otherwise weak. The girl was not examined by a physician until

some hours after she had complained to her mother. The examination disclosed no bleeding, an unruptured hymen, and no indication of semen, but did show a slight redness of the vagina—a fact possibly explainable by intervening events. The medical evidence was that it was medically impossible for penetration of the extent to which the girl testified to have occurred without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character. In short, the case against the minor rested entirely on the oral testimony of the young girl."

In today's opinion, however, after a remand of the case from the United States Supreme Court, the same majority changes its analysis of the same record evidence and now states that the trial judge could reasonably have inferred from Perele's testimony that she was *not* describing an act of sexual intercourse at all, but "was describing how it felt when a penis was pushed into the area between her legs and against or across the outer portion of her vagina." The majority in today's opinion also changes its former language from describing the evidence against Leonard as being "weak" to a description that there was "a claim of weakness of the case against defendant."

The majority's holding in today's opinion is simply not supported by any rational analysis of the evidence. In reaching its result to affirm the trial judge's finding, after the remand of this case from the United States Supreme Court, the majority enages in sheer specula-

tion by using the voir dire examination of Perele with respect to her competency to testify. The trial judge stated that, after observing numerous witnesses about the age of Perele, he concluded that "she appears to be more intelligent, competent, and articulate than the average five year old by a long shot." But this opinion of the trial judge at the beginning of trial can provide no basis for a subsequent speculation that Perele was describing some act other than an act of actual sexual intercourse when she stated that Leonard had put his "nooney" *into her* "nooney."

Furthermore, the testimony of Dr. Chavez set forth only a range of *possibilities*—not probabilities—that a penis, or a blunt object, or self-stimulation, could have caused the irritation to Perele's vagina. Evidence of *possibility* rather than probability, offered in support of a speculative contortion of a witness' testimony, constitutes no basis for a holding that a rational trier of fact could find from such evidence that elements of an offense have been proved beyond a reasonable doubt.

The evidence in the case at bench is just as deficient in supporting a finding of guilt as was the evidence in the *Reyes* case and falls within the analysis made by the *Reyes* court with respect to the evidence there presented. The *Reyes* court observed: "When viewed in a light most favorable to the prosecution, the evidence against Venegas [a defendant] at most gives rise to a bare suspicion of his complicity in the murder. As we stated in *Redmond,* 'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support

a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.' (71 Cal.2d at p. 755.) 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.' (People v. *Hall* (1964) *supra,* 62 Cal.2d 104, 112.) The case against Venegas is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (*Reyes, supra,* 12 Cal.3d 486, 500.)

I conclude that the case against Leonard in the instant action is fraught with the same degree of uncertainty as was found by the court in *Reyes* so as to "preclude a confident determination of guilt beyond a reasonable doubt." (*Id.* at p. 500.) A proper weighing of *all* the evidence in this case leads me to conclude that Leonard was found to have committed the offense charged upon clearly inadequate and insufficient evidence. He has been unconstitutionally convicted of committing a criminal offense since, upon such inadequate and insufficient evidence, no rational trier of fact could have found proof of guilt beyond a reasonable doubt within the principles mandated by *Jackson* v. *Virginia.*

II

The Constitutional Inadequacy of the Minor's Trial Counsel

The minor's contention that he was denied his constitutional right of effective assistance of trial counsel is predicated on the fact that his trial counsel failed to make a *Ballard* motion to have the trial court appoint a

psychiatrist to conduct a psychiatric examination of Perele, the child complaining witness. (See *Ballard* v. *Superior Court* (1966) 64 Cal.2d 159 [49 Cal.Rptr. 302, 410 P.2d 838, 18 A.L.R.3d 1416].) The majority holds that there is nothing in the record before us to lead to a conclusion other than that the failure of defendant's trial counsel to seek a psychiatric examination of the child complaining witness was anything other than a "reasoned tactical decision." I consider this view of the majority to be erroneous, untenable and a misapplication of the rules of law pertaining to what constitutes ineffective assistance of trial counsel to deprive a criminal defendant of his constitutional rights.

The majority recognizes that the seminal case of *Ballard* held that trial judges possessed a discretion to order a psychiatric examination of complaining witnesses in sexual offense cases in order to provide defendants with evidence to attack the credibility of such witness. Since the *Ballard* court talks about the discretionary power of the trial court to order a psychiatric examination of a complaining witness, the majority seems to assume that, had the minor's attorney sought a psychiatric examination of the five-year-old complaining witness, the trial judge could have exercised a valid discretion and denied the request. It is my view that, because of the crucial posture of the issue involved—the credibility of this five-year-old complaining witness contrasted with the credibility of the defense witnesses, it would have been a gross abuse of discretion for the trial court to have denied a motion made by defense counsel for such a psychiatric examination.

As pointed out by the *Ballard* court, "Professor Wigmore, in a widely quoted passage, stated, 'No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.' (3 Wigmore, Evidence, *supra,* 460; italics omitted.) [¶] This concern is stimulated by the possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense. *Thus, the testimony of a sympathy-arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term."* (Italics added.) (*Id.* p. 172.)

In *People* v. *Lang* (1974) 11 Cal.3d 134, 140, footnote 3 [113 Cal.Rptr. 9, 520 P.2d 393], the court expounded upon its views set forth in *Ballard* by stating: "Such an examination would seem a minimum protection for a defendant charged with molesting a child, *and only the rarest of cases would excuse counsel from obtaining one.*" (Italics added.) That a psychiatric examination of an alleged child victim who testifies to a molestation by a defendant is of acute importance and significance is emphasized in *People* v. *Thomas* (1978) 20 Cal.3d 457, 472 [143 Cal.Rptr. 215, 573 P.2d 433], in which it was stated: "While this court in *Ballard* specifically refrained from requiring such an examination in every type of sexual offense case, it later explained that a *Ballard*-type examination '. . . would seem a minimum protection

for a defendant *charged with molesting a child*, and only the rarest of cases would excuse counsel from obtaining one.' [Citation.]" (Conc. opn.) (Italics in original.)

In *People* v. *Pope* (1979) 23 Cal.3d 412, 424 [152 Cal.Rptr. 732, 590 P.2d 859], the court set forth the rule that "a conviction may not be upheld if the state has furnished an indigent with representation of lower quality than that of a reasonably competent attorney acting as a diligent, conscientious advocate." It is indubitably clear to me that, in the case before us, the failure of Leonard's trial counsel to make the *Ballard* motion cannot be construed as a "reasoned tactical decision" but as a failure to act in conformity with what a reasonably competent attorney would have done acting as a diligent, conscientious advocate.

In the case at bench the minor's defense, presented through a number of witnesses, was a complete denial of having committed the offense. This defense was substantially an alibi. In this situation the credibility of Perele, the five-year-old complaining witness, as contrasted with the credibility of the defense witnesses, became the crucial determination for the guilt or innocence of the minor. Under these circumstances, a failure by the minor's trial counsel to seek a psychiatric examination of the five-year-old complaining witness which might cast doubt on her credibility as a witness and thus support the credibility of the defense witnesses, constitutes a withdrawal of a crucial defense just as effectively as if no testimony at all had been introduced by defense counsel in an effort to prove the minor's denial defense.

We stated in *People* v. *Rodriguez* (1977) 73 Cal.App.3d 1023, 1031 [141 Cal.Rptr. 118]: "There is no logical distinction between the situation of counsel's inadequate preparation that results in the introduction of *no* testimony on a crucial defense and counsel's inadequate preparation that results in a failure to consider and introduce *corroborating* evidence needed to make a crucial defense, such as an alibi, substantial and effective.

In *In re Saunders* (1970) 2 Cal.3d 1033 [88 Cal.Rptr. 633, 472 P.2d 921], defense counsel in a murder case undertook no serious efforts to obtain available medical records of defendant which reflected defendant's past diagnosis and treatment for head injuries and made no effort to have defendant examined by a psychiatrist. Defense counsel decided not to present the defense of diminished capacity. In holding that defense counsel's omissions constituted ineffective asssitance of counsel, the court remarked: "We cannot say, of course, what such further inquiry might have revealed. Indeed, if counsel had sought to obtain other available records and had undertaken to have petitioner examined by a psychiatrist he might well have properly concluded on the basis of information so obtained to withhold any defense based upon petitioner's mental condition at the time of the offense. On the other hand, such investigation might have produced evidence upon the basis of which counsel would have wished to present a defense. By failing to make any effort at all to follow the lead afforded by information in his possession counsel precluded himself

from making a rational decision on the question." (*In re Saunders, supra,* 2 Cal.3d 1033, 1049.)

It is my view that the record in the case at bench demonstrates unerringly and unquestionably that the failure of the minor's trial counsel to seek a court-ordered psychiatric examination of the five-year-old complaining witness was *not* the result of any *unfortunate* choice of trial strategy. This omission of the minor's trial counsel simply " '*cannot be explained on the basis of any knowledgeable choice of tactics.*' " (*In re Julius B.* (1977) 68 Cal.App.3d 395, 402 [137 Cal.Rptr. 341].) (Italics in original.)

The record reveals that the minor's trial counsel sought to elicit evidence of the five-year-old complaining witness' tendency to falsify and her capacity and propensity for fantasy through cross-examination of the mother of the complaining witness. This shows that defense counsel was not completely unaware of the possibility of using the factor of a complaining witness' emotional and mental condition as a means of attacking her credibility as a witnesss, and, hence, that his omission to seek a psychiatric examination of the complaining witness cannot be considered a knowledgeable choice of trial tactics.

Finally, I allude to one other matter that amply demonstrates that defense counsel's omission to seek a court-ordered psychiatric examination of the five-year-old complaining witness cannot logically be attributed to a choice of trial tactics. I refer to the trial's court comment on defense counsel's performance in the case at bench.

During the disposition hearing the juvenile court judge stated on the record: "[A]nd, furthermore, very candidly I got the distinct impression throughout the trial, Mr. [defense counsel], that you were not overly experienced in criminal and juvenile matters, . . ."

It seems to me that our high court's view in *People* v. *Lang, supra,* 11 Cal.3d 134, demonstrates, with inexorable logic and compulsion, that defense counsel in the case at bench should have sought a psychiatric examination of the five-year-old complaining witness if he was to give the minor the effective assistance of trial counsel which is constitutionally required. When the court in *Lang* made the statement that "[s]uch an examination [a psychiatric examination of the complaining witness] would seem a *minimum* protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one" (*Lang, supra,* 11 Cal.3d 134, 140, fn. 3) (italics added), I see no basis for a conclusion that, in the case before us, a psychiatric examination of the complaining witness was *not* needed as a minimum protection for the minor who was charged with child molestation. Nor do I see how the instant case can be classified as falling within the exception of being one of those rare cases which would excuse defense counsel from seeking to obtain such a psychiatric examination.

On the contrary, the record before us is such that the conclusion is inescapable that if ever there existed *any* case in which a psychiatric examination of the child complaining witness was required in order to provide a

defendant or a minor in a juvenile court proceeding with a crucial defense, it is the case at bench. I would thus hold that the minor before us has been deprived of his constitutional right to effective assistance of trial counsel.

III

Disposition

Since, in my view, the evidence was insufficient to sustain the juvenile court's finding that the minor had committed a violation of Penal Code section 288, I would reverse the orders of the juvenile court with instructions to dismiss the petition. A second trial would be in violation of the minor's constitutional right against double jeopardy. This is the rule enunciated in *Burks* v. *United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]; *Greene* v. *Massey* (1978) 437 U.S. 19 [57 L.Ed.2d 15, 98 S.Ct. 2151]; and *People* v. *Pierce* (1979) 24 Cal.3d 199 209–210 [155 Cal.Rptr. 657, 595 P.2d 91].)

I would thus reverse the orders from which the appeal has been taken, with instructions to the trial court to dismiss the petition.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

July 2, 1979

Laurence S. Smith, Esq.
455 Capitol Mall
Suite 360
Sacramento, CA 95814

RE: Leonard M.
v. California
No. 78-1144

Dear Mr. Smith:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Jackson v. Virginia,* 443 U.S. ____ (1979). Mr. Justice Stevens dissents."

Very truly yours,

Michael Rodak, Jr.
Clerk

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APPENDIX C

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 4, Crim. No. 30946

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE LEONARD M.,
A Person Coming Under the Juvenile Court Law
FARE,
As Chief Probation Officer, etc.
v.
LEONARD M.

Appellant's petition for hearing DENIED.

Bird, C.J., Tobriner, J., and Mosk, J., are of the opinion that the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed December 18, 1979 which appears at 100 Cal. App. 3d 11. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.) Clark, J., concurs for the reason the opinion does not meet the criteria for publication of appellate opinions set forth in Rule 976(b), Cal. Rules of Court; that is, the opinion does not (1) establish a new rule of law or alter or modify an existing rule, (2) involve a legal issue of continuing public interest, or (3) criticize

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existing law. Instead, the case simply involves application of the substantial evidence rule reiterated by the high court in Jackson v. Virginia (1979) 443 U.S. ____ [61 L. Ed. 2d 560, 99 S.Ct., 2781.].

BIRD
Chief Justice

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1787
IN THE

Supreme Court of the United States

October Term, 1980

In re:

LEONARD M.,

Petitioner,

vs.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Motion for Leave to File and Petition for Writ of Mandamus.

RESPONSE OF REAL PARTY IN INTEREST IN OPPOSITION.

GEORGE DEUKMEJIAN, Attorney General of the State of California,
ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General — Criminal Division,
S. CLARK MOORE, Assistant Attorney General,
EDWARD T. FOGEL, JR., Deputy Attorney General,
GARY R. HAHN, Deputy Attorney General,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2079,
Attorneys for Real Party In Interest.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petitioner,

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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Motion for Leave to File and Petition for Writ of Mandamus.

RESPONSE OF REAL PARTY IN INTEREST IN OPPOSITION.

QUESTION PRESENTED.

Whether the respondent California Court of Appeal properly complied with the prior order of this Court to consider the case in light of *Jackson v. Virginia, infra,* and whether such reconsideration was a proper application of the record herein.

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Procedural History of Opinions Below.

The order finding petitioner to be a person within the meaning of section 602 of the California Welfare and Institutions Code and directing a suitable placement for him was first affirmed by the California Court of Appeal, Second Appellate District, Division Four, on October 27, 1978, in an opinion certified for publication. (See 85 Cal.App.3d 887, 149 Cal.Rptr. 791.) The Supreme Court of California denied a petition for hearing on January 3, 1979.

On July 2, 1979, this Court granted a petition for writ of certiorari with Mr. Justice Stevens dissenting. The judgment was vacated and the case remanded to the Court of Appeal of California, Second Appellate District, for "further consideration in light of *Jackson v. Virginia*,443 U.S. .... (1979)."

On August 7, 1979, the Court of Appeal of California, Second Appellate District, Division Four (respondent herein), issued an order requesting further briefing in light of this Court's July 2 order. (App.A).

On December 18, 1979, respondent Court of Appeal, in an opinion certified for publication (App. B), again affirmed the order in Petitioner's case. On March 14, 1980, the California Supreme Court denied hearing, but directed the Reporter of Decisions not to publish the opinion in the Official Reports (App. C).[1]

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code section 1651(a), or, in the alternative, Title 28, United States Code section 1257(3).

---

[1]Petitioner's Petition for Writ of Mandamus will hereinafter be referred to as "Petn."

ARGUMENT.

Since Respondent Court of Appeal's Opinion of December 18, 1979 Establishes That the Standard Enunciated in Jackson v. Virginia Was Applied to Review the Sufficiency of Evidence in Support of the Judgment Against Petitioner; There Is No Basis for This Court to Assert Its Jurisdiction.

It is settled law that in a petition for writ of mandamus filed before this Court, the only question should be whether the prior mandate of this Court has been followed. If such prior mandate has been followed, then there is no jurisdictional basis for any further inquiry. (*Fisher v. Hurst*, 333 U.S. 147, 150 (1948).)

This Court's prior order, after granting the petition for writ of certiorari, merely directed respondent Court of Appeal to reconsider petitioner's appeal in light of *Jackson v. Virginia, supra*, 443 U.S. 307, 99 S. Ct. 2781 (1979). That case, of course, established the standard for review by federal courts of the sufficiency of evidence to support state convictions when challenged in a petition for writ of habeas corpus. The standard enunciated was that the reviewing court should consider whether based upon all the evidence, a reasonable trier of fact could have found the accused guilty beyond a reasonable doubt. (*Id.*, 443 U.S. at 326; 99 S. Ct. at 2793.)

At that time, in view of the fact the opinion in *Jackson* had just been filed, it was still uncertain whether the standard of review by California appellate courts of the sufficiency

of evidence to support convictions met the minimum standards set forth in *Jackson*.[2]

In the subsequent opinion filed by the respondent Court of Appeal, that court noted: "The case has now been returned to us by the United States Supreme Court with directions to reconsider the issue under the standard laid down in *Jackson v. Virginia* (1979) 443 U.S. .... [61 L.Ed.2d 560]. We proceed to make such a review of the evidence." (Opn. pp. 5-6, App. B.) The respondent Court of Appeal next pointed out that its review was based on the entire record, including defense testimony. It then held that a reasonable finder of fact could have found petitioner guilty beyond a reasonable doubt. (*Id.* at p. 6 of Opn., App. B).

Real party in Interest submits that a plain reading of the opinion establishes respondent Court of Appeal's compliance with this Court's mandate of July 2, 1979. Petitioner's finding of guilt was examined in light of the standard enunciated in *Jackson v. Virginia*. Further support for this conclusion is found in the concurrence of Justice Clark in the California Supreme Court's order of March 14, 1980 wherein he concurred in the order directing the opinion not to be published because:

> "Instead, the case simply involves application of the substantial evidence rule reiterated by the high court in *Jackson v. Virginia* [citation omitted]." (App. C.)

---

[2]Real party would note that subsequently the California Supreme Court in *People v. Johnson*, 26 Cal.3d 557, 578, ... Cal. Rptr. .... held the state appellate review standard to be the same as the standard established in *Jackson*. Hence, considering that petitioner has had two appellate reviews, two reviews of petitions for hearing in the California Supreme Court, and one trial proceeding before a juvenile court judge of the Los Angeles Superior Court, he has had five adverse determinations rendered against him regarding the facts underlying the finding that he violated California Penal Code section 288, lewd conduct on a minor child. All five of these reviews were conducted with standards meeting minimum Due Process requirements.

In view of the fact respondent Court of Appeal complied with this Court's order of July 2, 1979 there is no basis upon which this Court's jurisdiction can be asserted.

Petitioner argues, in any event, that the evidence did not meet the *Jackson* standard because the evidence did not support the unlawful intercourse testified to by the five-year-old-child victim. (Petn. pp. 13-15.) This argument is erroneous and ignores the record.

The violation petitioner was found to have committed was the perpetration of a lewd act on a minor, not rape. The child, as noted by respondent Court of Appeal, testified petitioner put his "nooney" in her "nooney", using that term to describe their private parts. A physician later testified (Reporter's Transcript pp. 60, 75 of petitioner's hearing in the Los Angeles County Superior Court), that it was possible for a penis to have penetrated the minor's vagina to a sufficient degree to have caused the trauma he noted and not to have pierced the hymen. The farthest such penetration could have been was one-fourth of an inch.

Given the age and size of the child, it was proper for respondent Court of Appeal to have concluded a rational finder of fact could have believed her testimony. Since the testimony of one witness, if believed, is sufficient evidence to support a conviction (*In re Fredrick G.*, 96 Cal.App.3d 353, 366; 157 Cal.Rptr. 769, 777), it is clear no impropriety occurred with respect to respondent Court of Appeal's opinion following this Court's July 2, 1979 order.

Conclusion.

For the foregoing reasons, real party in interest respectfully urges this Court to deny the motion for leave to file and petition for writ of mandamus.

DATED: August 28, 1980.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General of the State of California,
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General — Criminal Division,
S. CLARK MOORE,
Assistant Attorney General,
EDWARD T. FOGEL, JR.,
Deputy Attorney General,
GARY R. HAHN,
Deputy Attorney General,

By GARY R. HAHN,
Deputy Attorney General,

APPENDIX A.

Order.

In the Court of Appeal of the State of California Second Appellate District Division Four.

In re Leonard Mann, a Person Coming Under the Juvenile Court Law.

Leonard Mann, Defendant and Appellant, vs. Kenneth F. Fare, as Acting Chief Probation Officer, etc., Petitioner and Respondent. Crim. No. 30946 (Superior Ct. No. J. 534011).

Filed: August 7, 1979.

The Supreme Court of the United States having vacated the judgment on appeal heretofore filed in the above entitled action and remanded the case to this court for further consideration in the light of *Jackson v. Virginia*, 443 U.S. .... (1979), now, therefore, it is ordered:

(1) Appellant shall file a supplemental memorandum of law within 20 days from the date of this order;

(2) Respondent shall have 20 days thereafter for supplemental memorandum;

(3) Appellant may have 20 days to reply to respondent's memorandum.

FILES, P.J.

APPENDIX B.

Appeal.

In the Court of Appeal of the State of California Second Appellate District Division Four.

In Re Leonard M., A Person Coming Under the Juvenile Court Law.

Kenneth F. Fare, As Chief Probation Officer, etc., Plaintiff and Respondent, v. Leonard M., Defendant and Appellant. 2 Crim. No. 30946 (Super. Ct. No. J-534,011).

Filed: December 18, 1979.

APPEAL from an order of the Superior Court, Los Angeles County. Peter S. Smith, Judge. Affirmed.

Eliot B. Feldman, Quin Denvir, State Public Defender of California, Russell I. Lynn and Laurance S. Smith, Deputy State Public Defenders for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Robert F. Katz and Gary R. Hahn, Deputy Attorneys General, for Plaintiff and Respondent.

A minor appeals from an order finding him to be a person within the meaning of section 602 of the Welfare and Institutions Code and directing a suitable placement for him. We affirm the order.

The minor, 16 years of age, was charged: (paragraph I) with committing a lewd act on a six year old girl; and (paragraph II) with orally copulating the same girl. After a hearing, he was found guilty under paragraph I; paragraph II was dismissed.

On this appeal, the minor contends: (1) that the evidence does not support the finding; and (2) that he has denied the effective assistance of counsel. We reject both contentions.

I.

The little girl testified that the minor, a neighbor boy, invited her into his house, asked her to lie down on the floor, pulled down her panties and his underpants and pants, lay down on top of her, and put his "nooney" into hers.[1]

The girl testified that, immediately after the events above described, she went home and immediately complained to her mother. She was not examined by a physician until several hours later. That examination disclosed no bleeding; no indication of semen, and an unruptured hymen; it disclosed a slight redness of the vagina.[2] The medical evidence was that it was medically impossible for there to have been

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[1]The girl's mother testified that, in the family, the word "nooney" referred to the vagina of a girl or the penis of a boy.

The girl's cross-examination, opening with a leading question by defense counsel, was as follows:

"Q You said Leonard put his nooney inside your nooney; is that right?
"A Yeah.
"Q And you said that hurt you?
"A Yeah.
"Q Did you feel it going inside your nooney?
"A Yeah.
"Q How far in your nooney did you feel it go?
"A A lot far.
"Q How far? Could you show me with your hands or your fingers?
"(Witness indicating.)
"MR. SMITH: Indicating about 10, 11 inches.
"THE COURT: Yes.
"BY MR. SMITH: Did you feel anything when Leonard put his nooney about that far into you?
"A Yeah.
"Q What did you feel?
"A It hurted me.
"Q Okay. Do you know what blood is?
"A Yeah.
"Q Did you see any blood?
"A No.
"Q Did you feel wet all over?
"A No."

[2]The evidence indicates the possibility that the redness was due to causes other than contact with the minor.

penetration without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character.

On this present appeal, defense counsel argues the case as though the charge had been rape. However, the charge and the finding were only of the commission of a lewd act, not rape. On a first appeal, we affirmed the finding on the ground that the little girl's testimony, believed by the trial court, was sufficient to sustain it. (*In re Leonard M.* (1978) 85 Cal.App.3d 887.) The case has now been returned to us by the United States Supreme Court with directions to reconsider the issue under the standard laid down in *Jackson v. Virginia* (1979) 443 U.S. .... [61 L.Ed.2d 560]. We proceed to make such a review of the evidence.

The standard thus imposed on us requires us to consider not only the case for the petitioner but the entire record, including the defense testimony, and to affirm only if we can find that a reasonable finder of fact could, on the whole evidence, rationally have found guilt beyond a reasonable doubt. We here make such a finding.

It is true that the child testified that the minor had put his nooney "in" hers, and on cross-examination she answered affirmatively to questions about how it felt "inside" her nooney, while the medical testimony showed that no penetration of more than a quarter of an inch could have occurred without rupture of the hymen. On this record the trial court could reasonably have inferred that the child was describing how it felt when a penis was pushed into the area between her legs and against or across the outer portion of her vagina. It was reasonable for the trial court to believe that the child had no conception that the cross-examiner's questions might have referred to a penetration beyond the

hymen. So interpreted, the child's testimony is not in conflict with the medical testimony, and is sufficient to support the finding of the trial court.

II.

The minor's other contention is that he was denied effective assistance of counsel in that his retained trial attorney had not sought a psychiatric examination of the little girl. As we did on the first appeal, we reject that contention.

Counsel rest their argument on *People v. Lang* (1974) 11 Cal.3d 134. In that case, which did involve several factual similarities, our Supreme Court said, in footnote 3 on page 140:

"Such an examination would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one. As the trial judge indicated in this case, shortly before finding defendant guilty, 'I don't know how bright these girls [the twins] are. I don't know what their capacity for fantasy is.' The results of a psychiatric examination of the twins might easily have tipped the balance in this close case in favor of defendant, whose strongest defense was that the twins lied about him." That statement was quoted with approval by the Chief Justice in her dissent in *People v. Thomas* (1978) 20 Cal.3d 457, at page 472.

Based on that language, and on a claim of weakness of the case against defendant, the minor here contends that the failure of his trial counsel to seek a psychiatric examination of the girl evidenced incompetency that deprived him of a fair trial.

We reject that contention. *Lang* did not hold that every failure to seek a psychiatric examination of an alleged victim in child abuse cases is, as a matter of law, an incompetent representation. Its holding went no further than to require

appellate counsel to raise that matter on appeal — a duty ably performed by the appellate counsel in this case. However, as the Supreme Court pointed out in *People v. Jenkins* (1975) 13 Cal.3d 749, at pages 754-755, quoting from *People v. Garrison* (1966) 246 Cal.App.2d 343, 350-351:

> ". . . However, in the absence of affirmatively showing that counsel acquiesced through ignorance of the facts of the law, defendants are not entitled to relief. 'The failure of counsel to object at the trial does not ordinarily indicate either incompetence of counsel or unfairness to the client. The system of objections is a useful tool in the hands of a trained professional for the exclusion of matter which should not be received into evidence. But the indiscriminate use of objections, solely because they are available, aids neither the client nor the cause of justice. The choice of when to object and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations] The decisions which counsel must make in the courtroom will necessarily depend in part upon what he then knows about the case, including what his own client has told him. There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision. Thus, the appellate court's inability to understand why counsel did as he did cannot be a basis for inferring that he was wrong.' "

Since a psychiatric examination of a witness is open to use by both sides (*People v. Blakesley* (1972) 26 Cal.App.3d 723, 729), it is a two-edged sword. Nothing in the record before us indicates that trial counsel was ignorant of his right to seek a psychiatric examination; nothing in that record tells us what investigation he may have made of the

ability of the girl to testify honestly and accurately. Since nothing in the record shows that the failure here complained of was not a reasoned tactical decision,[3] we cannot, on that record, hold that the trial counsel did not receive "the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate." (*People v. Pope* (1979) 23 Cal.3d 412, 427.)

The order is affirmed.

CERTIFIED FOR PUBLICATION.

KINGSLEY, J.

I concur:

FILES, P.J.

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[3]It is significant that the trial court, after a voir dire examination of the girl by defense counsel, denied that counsel's request to hold her incompetent to testify. The court said: ". . . I find that she is quite competent to testify. This court has had the opportunity in the last several years to observe numerous witnesses about the age of this child, and I would say that she appears to be more intelligent, competent, and articulate than the average five year old by a long shot, so your motion is denied. . . ."

JEFFERSON (Bernard), J.

I dissent.

Today's decision of the majority constitutes a grave and gross miscarriage of justice. For the second time in the history of this case, the majority affirms a finding by the trial court that Leonard, a 16-year-old minor, committed a lewd act upon Perele, a 5-year-old girl, based upon evidence that can only be described as substantially insubstantial, since it is totally conjectural, speculative and merely raises a weak suspicion of Leonard's culpability. In reaching this result, the majority places its stamp of approval upon the trial court's action of clothing the minor with the catastrophic lifetime stigma of having committed a serious sexual offense. Although I despise and detest the sexual crime of child molestation, and have no sympathy for a perpetrator thereof, I am unwilling to uphold the minor's conviction of such offense based upon the flimsy kind of evidence presented in the case at bench.

The history of this litigation is of more than slight significance. When this case originally came before us in 1978, the majority reached the same conclusion that it reaches today. (See *In re Leonard M.* (1978) 85 Cal.App.3d 887.) In the 1978 opinion, the majority rejected the minor's contentions that (1) the evidence was insufficient to support the finding that he had committed a violation of section 288 of the Penal Code, and (2) that he had been denied his constitutional right to effective assistance of counsel at his trial. The California Supreme Court denied a hearing, but the Supreme Court of the United States granted the minor's petition for a writ of certiorari. The nation's highest court vacated the 1978 judgment of this court and remanded the case to us for further consideration in light of *Jackson v. Virginia* (1979) 443 U.S. .... . In reaching its 1978 decision, the majority erroneously found no validity to the minor's

two contentions. In reaching the same result today, after a remand of the case from the United States Supreme Court, the majority pays only lip service to *Jackson v. Virginia* and again erroneously finds no validity to the minor's two contentions.

I found merit in both contentions of the minor when this case was before us in 1978 and I wrote a dissenting opinion. Today I find the minor's contentions to be even more meritorious because of *Jackson v. Virginia*. I thus find it necessary to again dissent from the views expressed by the majority today.

I.

Insufficiency of the Evidence.

In this case before us. the victim, Perele, a 5-year-old neighbor girl, testified that the minor, Leonard, a 16-year-old boy, had actual sexual intercourse with her — not simply the commission of a lewd act. I concede that the victim did not use the words "sexual intercourse." But she did use language which reasonably can only be interpreted as "sexual intercourse."

The mother of Perele testified that she had taught her children, both male and female, to use the term "nooney" as meaning both the female vagina and the male penis. Perele testified that Leonard's "nooney" was like her brother's, rather than like hers and, when asked "[w]hat did he do with his nooney?" she answered, "[*h*]*e put it in mine*." (Emphasis added.) She was asked "[c]ould you feel anything in your nooney when he started to put something into it?" She answered "[y]eah." In response to the question "[w]hat did you feel," she replied "I felt — I felt that it hurted." She then testified that he kept doing it even though she had said it was hurting.

On cross-examination, Perele was asked: "You said Leonard put his nooney inside your nooney; is that right?" She replied "[y]eah." She was then asked: "Did you feel it going inside your nooney?" She replied "[y]eah."

Next she was asked: "How far in your nooney did you feel it go?" Her answer was "[a] lot far." She was asked to show "how far" by use of her hands or fingers. Perele so indicated and the trial court agreed with counsel that the witness had indicated 10 or 11 inches.

The event described by Perele happened around 11:30 a.m. Perele, however, was not taken to the hospital until about 8:30 p.m. that evening. She was examined by Dr. Chavez. Dr. Chavez testified that his examination revealed there was some redness and swelling of the labia of the vagina but "[t]here was no evidence of bleeding, no evidence of laceration or hematoma, and the hymen was intact." Dr. Chavez also testified that it was medically impossible for the minor to have had sexual intercourse with the victim as described by her in her testimony. Dr. Chavez indicated that the irritation to the vagina was localized as he had described it. His testimony was that "[t]here was no evidence of a trauma in the inguinal area, the buttocks or the thighs. It was specifically localized."

With respect to the cause of the irritation to Perele's vagina, Dr. Chavez concluded that one of the possibilities was "sexual contact." He then defined "sexual contact" as denoting "that the genitalia of the patient [Perele] was in one form or another manipulated by some instrument; penis, hand, an artificial object." In describing the objects, he indicated he had in mind "blunt trauma from any object" and also "self-stimulation." Dr. Chavez also testified that the only possibility of a penis being inserted in Perele's vagina without rupturing the hymen would be that of a penetration of no more than ¼ of an inch.

It is to be noted that at no time did Dr. Chavez testify to any medical "*probability*" as distinguished from a "possibility" that the irritation to Perele's vagina resulted from either a male penis, some blunt object, or self-stimulation. Nor did he testify that any one of the three possibilities was more probable than another.

In addition, Perele testified that she had rubbed her "nooney" with her fingers on the day that she came home from Leonard's home and that, at other times when she rubbed her "nooney," it would get red.

Although this alleged incident was reported by Perele to her mother in the area of 11:30 a.m., the mother took Perele and her other children to a park that same day around 2 p.m. and did not return home until between 5 and 6 p.m. It is to be noted that Perele played at the park where there was located a slide, swings, and a monkey bar — all blunt objects that could cause trauma to a vagina.

The defendant called a number of witnesses in his defense, including a psychiatrist who conducted an examination of Leonard. The defense was in the nature of an alibi with disinterested testimony that Perele was not in the company of Leonard on the day in question.

The majority opinion expresses the view that defense counsel has argued this case as though the charge had been rape, when in fact the charge and finding were only that of the commission of a lewd act, not rape. But I do not construe defense counsel's argument in this manner. Although the charge was that of the commission of a lewd act, the alleged victim's testimony was unmistakably directed to the fact that she had been *raped* — not molested in any other fashion. The believability of her testimony that Leonard committed the act of *sexual intercourse* with her is the crucial issue involved in this case.

I agree with the majority that the question before us now, as it was in 1978, is whether the evidence was sufficient to sustain a finding that Leonard committed a lewd act upon Perele in violation of Penal Code section 288. On the first appear (*In re Leonard M.* (1978) 85 Cal.App.3d 887), the majority found that the evidence was sufficient. On the remand of the case to us from the United States Supreme Court with directions "for further consideration in light of *Jackson v. Virginia,* 443 U.S. .... (1979)," the majority reaches the very same conclusion it reached in the first appeal. Does this mean that the standard of appellate review for testing sufficiency of the evidence to sustain a criminal conviction set forth in *Jackson v. Virginia* is the same as that heretofore applied by the majority on the first appeal?

What is the standard for review mandated by *Jackson v. Virginia* when a contention is made on appeal that the evidence is insufficient to sustain a conviction? At one point in *Jackson v. Virginia,* the court observed: "After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Woodby v. INS, 385 US 276, 282, 17 L Ed 2d 362, 87 S Ct 483. Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 US 356, 362, 32 L Ed 2d 152, 92 S Ct 1620. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence,

and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (*Jackson v. Virginia, supra,* 443 U.S. .... , ... ; 61 L.Ed 2d 560, 573.) (Emphasis in original; fn. omitted.)

At another point in the opinion, the *Jackson v. Virginia* court makes the observation that a defendant is entitled to have his conviction set aside "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (*Id* at p. .... ; 61 L. Ed. 2d 560-577; fn. omitted.)

I interpret *Jackson v. Virginia* as mandating that, upon a contention being made that the evidence is insufficient to sustain a conviction, the appellate court must review *all of the evidence in the case,* including the *defense evidence* as well as the prosecution evidence, to determine whether a rational trier of fact could find that each element of the offense charged has been established beyond a reasonable doubt. To put it another way, *Jackson v. Virginia* tells us that if, upon *all* the evidence introduced at the trial, no rational trier could have found the existence of each element of the offense beyond a reasonable doubt, there is insufficiency of the evidence to sustain a conviction.

Since the decision of *Jackson v. Virginia,* there has been considerable decisional law discussion in California cases seeking to determine whether *Jackson* mandates a different standard of review from that previously followed by the California courts. In *In re Frederick G.* (1979) 96 Cal.App.3d 353, 365, the conclusion is reached that "the California substantial evidence test has not been changed by *Jackson* and that it comports with due process of law." In *In re*

Charles G. (1979) 95 Cal.App.3d 62, the court, although applying what it deemed the California substantial evidence test, concluded that there was substantial evidence to support a juvenile court's finding, but stating that the same conclusion would be reached following the *Jackson v. Virginia* standard, in that the court "would not conclude in the instant case that no rational trier of fact could have found true the allegation of the supplemental petition beyond a reasonable doubt." (*Id.* at p. 67; fn. 3.)

Long before *Jackson v. Virginia,* it had become established law in California that "[i]t is the fuction of [an appellate] court in reviewing a criminal conviction on appeal to determine whether the record contains *any substantial evidence* tending to support the finding of the trier of fact, and in considering this question we [the appellate court] must view this evidence in the light most favorable to the finding. [Citation.] The test is not whether guilt is established beyond a reasonable doubt. [Citations.]" (*In re Roderick P.* (1972) 7 Cal.3d 801, 808.) (Emphasis added.) The *In re Roderick P.* court stated that this same principle of appellate review was applicable to juvenile court proceedings. (*In re Roderick P., supra,* 7 Cal.3d 801, 809.)

The serious question to be answered under California's "substantial evidence" test is what is meant by "any substantial evidence." The California Supreme Court has defined "any substantial evidence" to mean "evidence that reasonably inspires confidence" and "is 'of solid value.' " (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *In re Roderick P., supra,* 7 Cal.3d 801, 809.) We need to consider, however, how this definition of substantial evidence fits into the mandate of *Jackson v. Virginia.* I do not agree with *In re Frederick G.* and *In re Charles G.* in their analyses that *Jackson v. Virginia* has *not* mandated a different standard for the appellate courts of California when the issue is raised

that the evidence is insufficient to sustain a defendant's conviction.

The pronouncements of the California Supreme Court that the substantial evidence test is satisfied if there is evidence in the record that "reasonably inspires confidence" and is of "solid value" to support a defendant's conviction have been given lip service only, because of decisional law interpretations of what these phrases mean. Thus, the decisional law has sanctioned the view that a child complaining witness' testimony which is suspect and permeated with indicia of untrustworthiness and unreliability constitutes substantial evidence that "reasonably inspires confidence" and is of "solid value" simply and solely because a trial judge chose to believe such testimony. The majority in the case before us on the first appeal applied this test when it stated: "The young girl testified quite positively that the minor had invited her into his home, where he was alone, and there committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding."

I cannot agree, therefore, that *Jackson v. Virginia* has *not* changed prior California law, in view of the fact that, under such prior California law, untrustworthy and unreliable testimony has been considered sufficient to sustain a conviction. I would consider the failure of the California Supreme Court to grant a hearing after the majority's decision in the instant case in 1978 as some substantiation of my view that the prior California substantial-evidence test did not require a reversal of a defendant's conviction that was based on inadequate and insufficient evidence as long as the trier of fact chose to believe such evidence.

What is significant about *Jackson v. Virginia*, contrasted with California's substantial evidence test, is that it focuses the appellate inquiry on a defendant's constitutional due

process right *not* to be convicted on *inadequate* evidence that "cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. at p. .... , 61 L. Ed. 2d at p. 57). The California "any substantial evidence" rule has not focused on the inquiry in terms of whether the trier of fact has violated this constitutional due process right.

That the prior California rule of appellate review cannot be considered as the substantial equivalent of the due process standard set forth in *Jackson v. Virginia* is demonstrated by the fact that some of the decisional law in California has distinguished between a standard of review for first degree murder verdicts and all other criminal cases. In *People v. Fonville* (1973) 35 Cal.App.3d 693, 703-704, the court remarked: " 'In conventional appellate review the function "begins and ends" with the discovery of substantial evidence supporting the verdict. [Citation.] The task is relatively passive, relatively one-sided, fulfulled when the prosecution evidence turns out to be "reasonable in nature, credible, and of solid value; . . ." [Citation.] In the review of first degree murder verdicts (especially when featured by possibilities of diminished capacity) the substantial evidence formulation persists, but the appellate role is more intense, more active. Appellate duty is not satisfied, in the latter case, *when substantial evidence emerges on one side.* Rather, the judges must look to the evidence *on both sides* and not limit their scrutiny to that supporting the verdict.' " (Emphasis added.)

And in *People v. Bassett* (1968) 69 Cal.2d 122, our high court seemed to draw a distinction between the scope of appellate review in cases in which the crime charged is divided into degrees and cases in which the offense charged is not divided into degrees. Thus we find the *Bassett* court

stating that, " '[s]ince the amendment of Penal Code section 1811 in 1927,[1] this court is empowered to modify the judgment and fix a lesser degree of the crime in those instances where *on an appraisal of all the evidence* there is found to be lacking any *substantial* evidence of the elements required to constitute the degree of the crime as fixed by the jury. [Citations.]' [¶] As the emphasized language indicates, our task in this regard is twofold. First, we must resolve the issue in the light of the *whole record* — i.e., the entire picture of the defendant put before the jury — and may not limit our appraisal to isolated bits of evidence selected by the respondent." (*Id.* at pp. 137-138.) (Emphasis in original; fn. omitted.)

If we are to accept *Bassett* as stating the rule of appellate review prior to *Jackson v. Virginia,* we must conculde that to test the sufficiency of the evidence to sustain a finding that all elements of an offense have been established beyond a reasonable doubt, the test to be applied of "an appraisal of all of the evidence" applies only to crimes divided into degrees. In the case before us the offense of lewd conduct with a minor is not an offense divided into degrees. Under the *Bassett* formula, and also under the *Fonville* formula, the appellate court would be exercising "conventional appellate review" without the necessity of a search of the entire record. I submit that the *Bassett* and *Fonville* rules for conventional appellate review for crimes not divided

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[1]In pertinent part, Penal Code section 1181, subdivision 6, provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] 6 When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lessor crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

into degrees and for crimes other than first degree murder are in violation of the due process of law standard of appellate review established by *Jackson v. Virginia.*

Has *Bassett* and *Fonville* been modified by subsequent cases? There is language in subsequent cases which at first glance, might seem to indicate a modification. Thus in *People v. Reyes* (1974) Cal.3d 486, we find the following language which would appear to epitomize the California rule prior to *Jackson v. Virginia:* "There is merit to Venegas' [a defendant] contention that the evidence adduced at trial is insufficient to support the judgment rendered against him. In reviewing a criminal conviction, an 'appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonble doubt.' (*People v. Reilly* (1970) 3 Cal.3d 421, 425 [90 Cal.Rptr. 417, 475 P.2d 649]; see also *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [107 Cal.Rptr. 184, 507 P.2d 1392, 57 A.L.R.3d 1199]; *People v. Redmond* (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321]; *People v. Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193, 443 P.2d 777]; *People v. Hall* (1964) 62 Cal.2d 104, 109-110 [41 Cal.Rptr. 284, 396 P.2d 700].) The substantial evidence rule is our yardstick for determining whether a verdict meets this minimal standard of reasonableness: 'The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' (*People v. Mosher* (1969) 1 Cal.3d 379, 395 [82 Cal.Rptr. 379, 461 P.2d 659]; see also *People v. Kunkin* (1973) *supra; People v. Reilly* (1970) *supra; People v. Redmond* (1969) *supra.*) To be considered substantial, evidence must be of the type which 'reasonably inspires confidence and is "of solid value." ' " (*Reyes, supra,* 12 Cal.3d 486, 496-497.)

Significancy must be attached to the fact that *Reyes* cites *Bassett* as one of the authorities for the substantial evidence test. And since *Reyes* was a murder case, we can assume that the substantial evidence test discussed what that applicable to murder cases and cases involving crimes divided into degrees so that the record evidence reviewed would be the *entire* evidence — not simply the evidence introduced by the prosecution. Only the prosecution's evidence constitutes the record evidence reviewed under the conventional appellate review test sanctioned expressly by *Fonville* and impliedly by *Bassett*.

The conventional appellate review test sanctioned by *Fonville* and *Bassett* simply cannot be squared with the requirements of *Jackson v. Virginia*. There can no longer be a test for determining sufficiency of the evidence that does not require, in the case of all crimes, an appellate review of *all* the evidence — both that presented by the prosecution and that presented by the defendant — in order to determine a defendant's claim that he has been convicted upon inadequate or insufficient evidence — evidence upon which no rational trier of fact could have found proof of guilt beyond a reasonable doubt. As *Jackson v. Virginia* points out, "[t]he question whether a defendant has been convicted upon *inadequate* evidence is central to the basic question of guilt or innocence." (*Jackson v. Virginia, supra*, 443 U.S. .... , ... , 61 L.Ed2d 560, 576.) (Emphasis added.)

The majority in today's opinion recognizes that *Jackson v. Virginia* requires an appellate court to review and examine *all* of the record evidence in order to determine whether a rational trier of fact could find every element of the charged offense established beyond a reasonable doubt. But the crucial point at issue is what must be looked for in that examination and review. The majority in the case before

us seems to say that, after an examination of all of the evidence has been made, the appellate court is still entitled to conclude that the prosecution's evidence — even though it be conjectural, speculative, untrustworthy and unreliable and, hence, inadequate — can still constitute substantial evidence to permit the appellate court to conclude that a reasonable trier of fact could find all of the elements of the offense against a defendant established beyond a reasonable doubt.

In my view, *Jackson v. Virginia* requires that, in examining *all* of the evidence in a criminal case, the appellate court must weigh and contrast any weak, unsatisfactory, untrustworthy and unreliable evidence introduced in support of the prosecution's case with any strong, reliable and trustworthy evidence presented by the defense. In such a case an analysis of all such evidence leads inexorably to a holding that, under *Jackson v. Virginia,* a defendant has set forth a valid constitutional due process claim that the evidence in support of his conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt. That is exactly the situation presented in the case before us.

The instant case demonstrates how easy it is for an appellate court to simply pay lip service to the principle mandated by *Jackson v. Virginia*. The majority opinion, written in 1978, stated that the trial judge was entitled to believe Perele's testimony that Leonard had "committed an act of intercourse with her," even though the majority described the case against Leonard as being weak and used the following language in so describing this weakness: "However, the evidence was otherwise weak. The girl was not examined by a physician until some hours after she had complained to her mother. The examination disclosed no bleeding, an unruptured hymen, and no indication of semen,

but did show a slight redness of the vagina — a fact possibly explainable by intervening events. The medical evidence was that it was medically impossible for penetration of the extent to which the girl testified to have occurred without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character. In short, the case against the minor rested entirely on the oral testimony of the young girl."

In today's opinion, however, after a remand of the case from the United States Supreme Court, the same majority changes its analysis of the same record evidence and now states that the trial judge could reasonably have inferred from Perele's testimony that she was *not* describing an act of sexual intercourse at all, but "was describing how it felt when a penis was pushed into the area between her legs and against or across the outer portion of her vagina." The majority in today's opinion also changes its former language from describing the evidence against Leonard as being "weak" to a description that there was "a claim of weakness of the case against defendant."

The majority's holding in today's opinion is simply not supported by any rational analysis of the evidence. In reaching its result to affirm the trial judge's finding, after the remand of this case from the United States Supreme Court, the majority engages in sheer speculation by using the voir dire examination of Perele with respect to her competency to testify. The trial judge stated that, after observing numerous witnesses about the age of Perele, he concluded that "she appears to be more intelligent, competent, and articulate than the average five year old by a long shot." But this opinion of the trial judge at the beginning of trial can provide no basis for a subsequent speculation that Perele was describing some act other than an act of actual sexual

intercourse when she stated that Leonard had put his "nooney" *into her* "nooney."

Furthermore, the testimony of Dr. Chavez set forth only a range of *possibilities* — not probabilities — that a penis, or a blunt object, or self-stimulation, could have caused the irritation to Perele's vagina. Evidence of *possibility* rather than probability, offered in support of a speculative contortion of a witness' testimony, constitutes no basis for a holding that a rational trier of fact could find from such evidence that elements of an offense have been proved beyond a reasonable doubt.

The evidence in the case at bench is just as deficient in supporting a finding of guilt as was the evidence in the *Reyes* case and falls within the analysis made by the *Reyes* court with respect to the evidence there presented. The *Reyes* court observed: "When viewed in a light most favorable to the prosecution, the evidence against Venegas [a defendant] at most gives rise to a bare suspicion of his complicity in the murder. As we stated in *Redmond*, 'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.' (71 Cal.2d at p. 755.) 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.' (*People v. Hall* (1964) *supra*, 62 Cal.2d 104, 112.) The case against Venegas is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (*Reyes, supra*, 12 Cal.3d 486, 500.)

I conclude that the case against Leonard in the instant action is fraught with the same degree of uncertainty as was found by the court in *Reyes* so as to "preclude a confident

determination of guilt beyond a reasonable doubt." (*Id.* at p. 500.) A proper weighing of *all* the evidence in this case leads me to conclude that Leonard was found to have committed the offense charged upon clearly inadequate and insufficient evidence. He has been unconstitutionally convicted of committing a criminal offense since, upon such inadequate and insufficient evidence, no rational trier of fact could have found proof of guilt beyond a reasonable doubt within the principles mandated by *Jackson v. Virginia*.

II.

The Constitutional Inadequacy of the Minor's Trial Counsel

The minor's contention that he was denied his constitutional right of effective assistance of trial counsel is predicated on the fact that his trial counsel failed to make a *Ballard* motion to have the trial court appoint a psychiatrist to conduct a psychiatric examination of Perele, the child complaining witness. (See *Ballard v. Superior Court* (1966) 64 Cal.2d 159.) The majority holds that there is nothing in the record before us to lead to a conclusion other than that the failure of defendant's trial counsel to seek a psychiatric examination of the child complaining witness was anything other than a "reasoned tactical decision." I consider this view of the majority to be erroneous, untenable and a misapplication of the rules of law pertaining to what constitutes ineffective assistance of trial counsel to deprive a criminal defendant of his constitutional rights.

The majority recognized that the seminal case of *Ballard* held that the trial judges possessed a discretion to order a psychiatric examination of complaining witnesses in sexual offense cases in order to provide defendants with evidence to attack the credibility of such witnesses. Since the *Ballard* court talks about the discretionary power of the trial court

to order a psychiatric examination of a complaining witness, the majority seems to assume that, had the minor's attorney sought a psychiatric examination of the five-year-old complaining witness, the trial judge could have exercised a valid discretion and denied the request. It is my view that, because of the crucial posture of the issue involved — the credibility of this five-year-old complaining witness contrasted with the credibility of the defense witnesses, it would have been a gross abuse of discretion for the trial court to have denied a motion made by defense counsel for such a psychiatric examination.

As pointed out by the *Ballard* court, "Professor Wigmore, in a widely quoted passage, stated, 'No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.' (3 Wigmore Evidence, *supra*, 460; italics omitted.) [¶] This concern is stimulated by the possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense. *Thus, the testimony of a sympathy-arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term.*" (Emphasis added.) (*Id.* at p. 172.)

In *People v. Lang* (1974) 11 Cal.3d 134, 140, fn. 3, the court expounded upon its views set forth in *Ballard* by stating: "Such an examination would seem a minimum protection for a defendant charged with molesting a child, *and only the rarest of cases would excuse counsel from obtaining one.*" (Emphasis added.) That a psychiatric examination of an alleged child victim who testifies to a molestation by a defendant is of acute importance and significance is emphasized in *People v. Thomas* (1978) 20 Cal.3d 457, 472,

in which it was stated: "While this court in *Ballard* specifically refrained from requiring such an examination in every type of sexual offense case, it later explained that a *Ballard*-type examination' . . . would seem a minimum protection for a defendant *charged with molesting a child,* and only the rarest of cases would excuse counsel from obtaining one.' [Citation.]" (Concurring opinion.) (Emphasis in original.)

In *People v. Pope* (1979) 23 Cal.3d 412, 424, the court set forth the rule that "a conviction may not be upheld if the state has furnished an indigent with representation of lower quality than that of a reasonably competent attorney acting as a diligent, conscientious advocate." It is indubitably clear to me that, in the case before us, the failure of Leonard's trial counsel to make the *Ballard* motion cannot be construed as a "reasoned tactical decision" but as a failure to act in conformity with what a reasonably competent attorney would have done acting as a diligent, conscientious advocate.

In the case at bench the minor's defense, presented through a number of witnesses, was a complete denial of having committed the offense. This defense was substantially an alibi. In this situation the credibility of Perele, the five-year-old complaining witness, as contrasted with the credibility of the defense witnesses, became the crucial determination for the guilt or innocence of the minor. Under these circumstances, a failure by the minor's trial counsel to seek a psychiatric examination of the five-year-old complaining witness which might cast doubt on her credibility as a witness and thus support the credibility of the defense witnesses, constitutes a withdrawal of a crucial defense just as effectively as if no testimony at all had been introduced by defense counsel in an effort to prove the minor's denial defense.

We stated in *People v. Rodriguez* (1977) 73 Cal. App.3d 1023, 1031: "There is no logical distinction between the situation of counsel's inadequate preparation that results in the introduction of *no* testimony on a crucial defense and counsel's inadequate preparation that results in a failure to consider and introduce *corroborating* evidence needed to make a crucial defense, such as an alibi, substantial and effective."

In *In re Saunders* (1970) 2 Cal.3d 1033, defense counsel in a murder case undertook no serious efforts to obtain available medical records of defendant which reflected defendant's past diagnosis and treatment for head injuries and made no effort to have defendant examined by a psychiatrist. Defense counsel decided not to present the defense of diminished capacity. In holding that defense counsel's omissions constituted ineffective assistance of counsel, the court remarked: "We cannot say, of course, what such further inquiry might have revealed. Indeed, if counsel had sought to obtain other available records and had undertaken to have petitioner examined by a psychiatrist he might well have properly concluded on the basis of information so obtained to withhold any defense based upon petitioner's mental condition at the time of the offense. On the other hand, such investigation might have produced evidence upon the basis of which counsel would have wished to present a defense. By failing to make any effort at all to follow the lead afforded by information in his possession counsel precluded himself from making a rational decision on the question." (*In re Saunders, supra,* 2 Cal.3d 1033, 1049.)

It is my view that the record in the case at bench demonstrates unerringly and unquestionably that the failure of the minor's trial counsel to seek a court-ordered psychiatric examination of the five-year-old complaining witness was *not* the result of any *unfortunate* choice of trial strategy.

This omission of the minor's trial counsel simply " '*cannot be explained on the basis of any knowledgeable choice of tactics.*' " (*In re Julius B.* (1977) 68 Cal.App.3d 395, 402.) (Emphasis in original.)

The record reveals that the minor's trial counsel sought to elicit evidence of the five-year-old complaining witness' tendency to falsify and her capacity and propensity for fantasy through cross-examination of the mother of the complaining witness. This shows that defense counsel was not completely unaware of the possibility of using the factor of a complaining witness' emotional and mental condition as a means of attacking her credibility as a witness, and, hence, that his omission to seek a psychiatric examination of the complaining witness cannot be considered a knowledgeable choice of trial tactics.

Finally, I allude to one other matter that amply demonstrates that defense counsel's omission to seek a court-ordered psychiatric examination of the five-year-old complaining witness cannot logically be attributed to a choice of trial tactics. I refer to the trial court's comment on defense counsel's performance in the case at bench. During the disposition hearing the juvenile court judge stated on the record: "[A]nd, furthermore, very candidly I got the distinct impression throughout the trial, Mr. [defense counsel], that you were not overly experienced in criminal and juvenile matters, . . . "

It seems to me that our high court's view in *People v. Lang, supra,* demonstrates, with inexorable logic and compulsion, that defense counsel in the case at bench should have sought a psychiatric examination of the five-year-old complaining witness if he was to give the minor the effective assistance of trial counsel which is constitutionally required. When the court in *Lang* made the statement that "[s]uch an examination [a psychiatric examination of the complain-

ing witness] would seem a *minimum* protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one'' (*Lang, supra,* 11 Cal.3d 134, 140, fn. 3) (emphasis added), I see no basis for a conclusion that, in the case before us, a psychiatric examination of the complaining witness was *not* needed as a minimum protection for the minor who was charged with child molestation. Nor do I see how the instant case can be classified as falling within the exception of being one of those rare cases which would excuse defense counsel from seeking to obtain such a psychiatric examination.

On the contrary, the record before us is such that the conclusion is inescapable that if ever there existed *any* case in which a psychiatric examination of the child complaining witness was required in order to provide a defendant or a minor in a juvenile court proceeding with a crucial defense, it is the case at bench. I would thus hold that the minor before us has been deprived of his constitutional right to effective assistance of trial counsel.

III.

Disposition

Since, in my view, the evidence was insufficient to sustain the juvenile court's finding that the minor had committed a violation of Penal Code Section 288, I would reverse the orders of the juvenile court with instructions to dismiss the petition. A second trial would be in violation of the minor's constitutional right against double jeopardy. This is the rule enunciated in *Burks v. United States* (1978) 437 U.S. 1; *Greene v. Massey* (1978) 437 U.S. 19; and *People v. Pierce* (1979) 24 Cal.3d 199, 209-210.)

I would thus reverse the orders from which the appeal has been taken, with instructions to the trial court to dismiss the petition.

JEFFERSON (Bernard), J.

APPENDIX C.

Order Denying Hearing After Judgment by the Court of Appeal.

In the Supreme Court of the State of California In Bank.

In Re Leonard M., A Person Coming Under the Juvenile Court Law.

Fare, As Chief Probation Officer, etc. v. Leonard M. 2d District, Division 4, Crim. No. 30946.

Filed: March 14, 1980.

Appellant's petition for hearing DENIED.

Bird, C.J., Tobriner, J., and Mosk, J., are of the opinion that the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed December 18, 1979 which appears at 100 Cal.App. 3d 11. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.) Clark J., concurs for the reason the opinion does not meet the criteria for publication of appellate opinions set forth in Rule 976(b), Cal. Rules of Court; that is, the opinion does not (1) establish a new rule of law or alter or modify an existing rule, (2) involve a legal issue of continuing public interest, or (3) criticize existing law. Instead, the case simply involves application of the substantial evidence rule reiterated by the high court in Jackson v. Virginia (1979) 443 U.S. —— [61 L. Ed. 2d 560, 99 S.Ct., 2781.].

BIRD,
Chief Justice